TEXAS REGISTER

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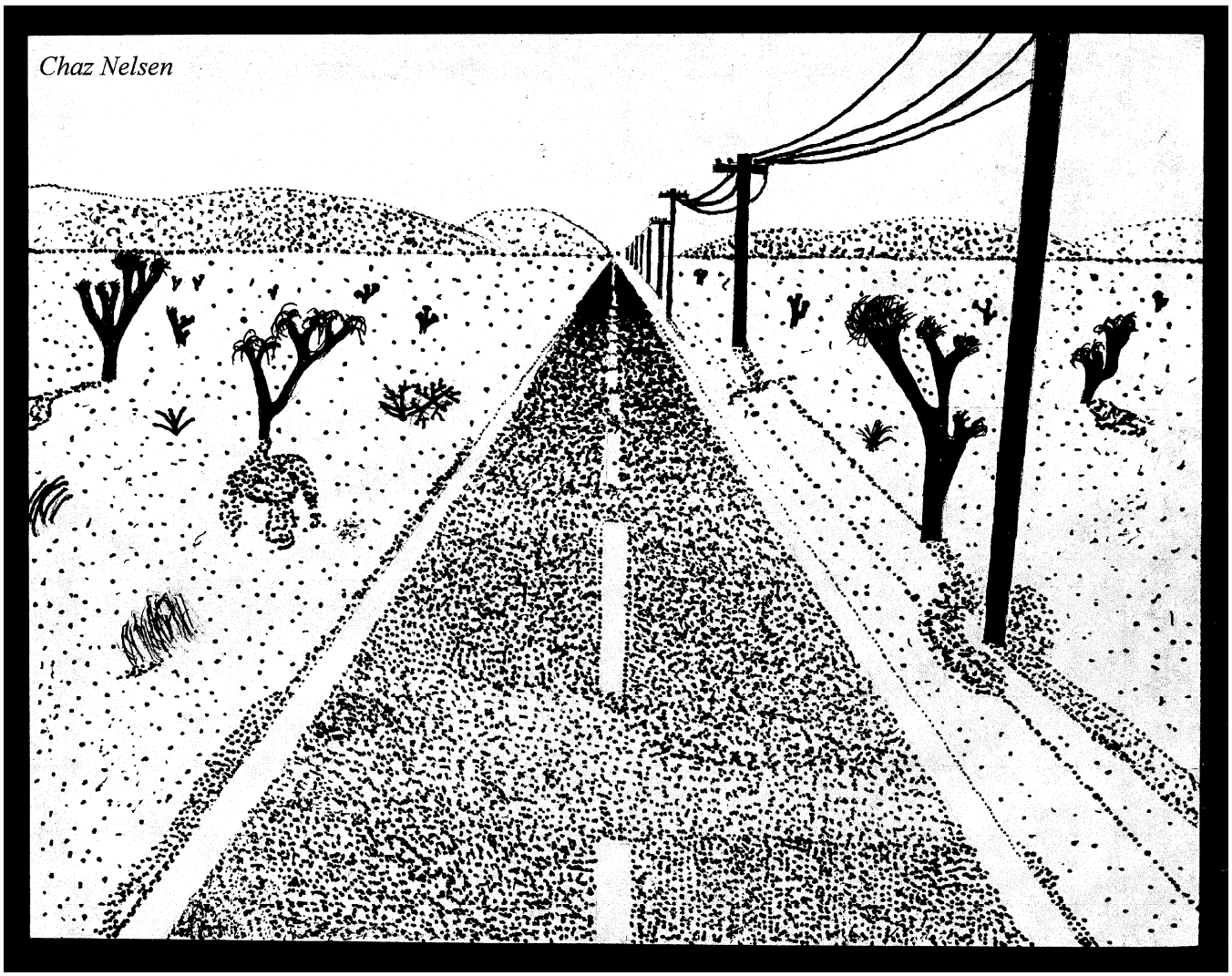

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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http://www.sos.state.tx.us
register@sos.state.tx.us

IN THIS ISSUE

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for February 28, 2009

Appointed to be Adjutant General of Texas for a term to expire February 1, 2011, Jose S. Mayorga, Jr. of Round Rock. General Mayorga is replacing Lt. General Charles Rodriguez of Austin whose term expired.

Appointed to be presiding officer of the Camino Real Regional Mobility Authority for a term to expire February 1, 2011, Harold W. Hahn of El Paso. Mr. Hahn is being reappointed.

Appointed to be a member of the Sabine River Compact Administration for a term to expire July 12, 2010, Jerry F. Gipson of Longview. Mr. Gipson is replacing Rick Campbell of Center who resigned.

Appointed to be a member of the Texas Guaranteed Student Loan Corporation for a term to expire January 31, 2015, Dora Ann Verde of San Antonio (Ms. Verde is being reappointed).

Appointed to be a member of the Texas Guaranteed Student Loan Corporation for a term to expire January 31, 2015, Richard M. Rhodes of El Paso (replacing Ruben Esquivel of DeSoto whose term expired).

Appointed to be a member of the Texas Guaranteed Student Loan Corporation for a term to expire January 31, 2015, Welcome W. Wilson, Jr. of Houston (replacing Tommy Brooks of Sugar Land whose term expired).

Appointed to be a member of the Texas Commission on Jail Standards for a term to expire January 31, 2015, Irene A. Armendariz of El Paso (Ms. Armendariz is being reappointed).

Appointed to be a member of the Texas Commission on Jail Standards for a term to expire January 31, 2015, Franklin Tam Terry of White Deer (Sheriff Terry is being reappointed).

Appointed to be a member of the Texas Commission on Jail Standards for a term to expire January 31, 2015, Gary Painter of Midland (replacing David Gutierrez of Lubbock whose term expired).

Appointed to be a member of the Industrialized Building Code Council for a term to expire February 1, 2011, Robert L. Bowling, IV of El Paso (reappointment).

Appointed to be a member of the Industrialized Building Code Council for a term to expire February 1, 2011, Mark Delaney of Tomball (reappointment).

Appointed to be a member of the Industrialized Building Code Council for a term to expire February 1, 2011, Michael Mount of Plano (reappointment).

Appointed to be a member of the Industrialized Building Code Council for a term to expire February 1, 2011, Rolando R. Rubiano of Harlingen (reappointment).

Appointed to be a member of the Industrialized Building Code Council for a term to expire February 1, 2011, Ravi Shah of The Colony (reappointment).

Appointed to be a member of the Industrialized Building Code Council for a term to expire February 1, 2011, Larry E. Wilkinson of Friendswood (reappointment).

Appointed to the Small Business Compliance Assistance Advisory Panel for a term to expire at the pleasure of the Governor, Billy Bob McAdams of Center (replacing Ken Legler of Houston who resigned).

Appointed to the Drought Preparedness Council for a term to expire at the pleasure of the Governor, David A. Van Dresar of La Grange (replacing Harvey Everheart of Lamesa who no longer qualifies).

Designating Donna S. Klaeger as Presiding Officer of the Texas Commission on Jail Standards for a term at the pleasure of the Governor. Judge Klaeger is replacing David Gutierrez of Lubbock as presiding officer.

Rick Perry, Governor

TRD-200900927

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0784-GA

Requestor:

The Honorable Tom Maness

Jefferson County Criminal District Attorney

Jefferson County Courthouse

1001 Pearl Street-3rd Floor

Beaumont, Texas 77701-3545

Re: Calculation of maximum time allowable for tax abatement under section 312.204, Tax Code (RQ-0784-GA)

Briefs requested by March 30, 2009

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200900926
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: March 4, 2009

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Opinions

Opinion No. GA-0694

The Honorable Roy L. Cordes, Jr.

Fort Bend County Attorney

301 Jackson Street, Suite 728

Richmond, Texas 77469-3108

Re: Whether a county must consider longevity pay when determining a statutory county court judge's salary under Government Code section 25.0005(a) (RQ-0731-GA)

S U M M A R Y

Based on the plain language of the statute, a county may, but is not required to, consider the amount of longevity pay received by some but not all district judges in the county when determining the salary for a statutory county court judge in accordance with Government Code section 25.0005(a).

Opinion No. GA-0695

The Honorable Frank J. Corte, Jr.

Chair, Committee on Defense and Veterans' Affairs

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re Constitutionality of proposed legislation that would provide for the suspension or revocation of the business license of employers of undocumented aliens (RQ-0732-GA)

S U M M A R Y

If the Texas Legislature were to enact a statewide licensing statute that closely tracks the Legal Arizona Workers Act, and the Fifth Circuit Court of Appeals were to adopt the reasoning of the Ninth Circuit Court of Appeals, such a statute would be upheld on the grounds that, as a licensing statute, it is within the exception to the Federal Immigration Reform and Control Act of 1986.

Opinion No. GA-0696

The Honorable Armando R. Villalobos

Cameron County District Attorney

Cameron County Courthouse

Post Office Box 2299

Brownsville, Texas 78522-2299

Re: Duties and compensation of foreign-language interpreters appointed under Code of Criminal Procedure article 38.30 (RQ-0739-GA)

S U M M A R Y

Foreign language interpreters appointed pursuant to Code of Criminal Procedure article 38.30 in a criminal proceeding are required to interpret for a witness or the person charged. They are not required to perform translation work for the district attorney in preparation for a criminal proceeding, and their compensation under article 38.30 does not cover such work. The commissioners court has authority to prepare the county budget, but it can be enjoined from adopting a budget that fails to provide essential funding for a prosecuting attorney's office.

Opinion No. GA-0697

Mr. Robert Scott

Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Authority of a home rule city to enforce land development regulations against an independent school district for the purposes of aesthetics and the maintenance of property values (RQ-0741-GA)

S U M M A R Y

A home rule city may enforce its reasonable land development regulations and ordinances against an independent school district for the purposes of aesthetics and the maintenance of property values.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200900922
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: March 3, 2009

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

16 TAC §309.8

The Texas Racing Commission adopts on an emergency basis an amendment to 16 TAC §309.8, Racetrack License Fees, relating to the fees charged to pari-mutuel racetrack licensees. The changes to §309.8 increase the annual license fee for licensed but inactive pari-mutuel racetracks by $25,000 annually. For Fiscal Year 2009, the inactive racetracks are credited for the amounts already paid on September 1, 2008, and the additional $25,000 is due on March 15, 2009. For the fiscal years beginning on September 1, 2009, and beyond, the total inactive license fee will be due on September 1 of each year.

The amendment is adopted on an emergency basis to ensure that the Commission has sufficient operating funds to continue regulation of the racing industry. As of February 2009, the Texas Racing Commission is facing a revenue shortfall for the current fiscal year of $677,833, or approximately 14% of the agency's total appropriation amount for agency operations. The agency has taken immediate steps to address the situation including implementing budget reductions and requesting a Governor's Emergency and Deficiency Grant in the amount of $250,000. However, these steps may not provide the agency with enough cash on hand to continue operations.

The agency is funded solely through general revenue-dedicated appropriations from racing industry fees, fines, and a portion of pari-mutuel wagering revenue from "outstanding tickets"--the uncashed winning tickets of racetrack patrons. The outstanding tickets revenue, which is collected quarterly and makes up approximately $1.7 million, or 31%, of the agency's $5.5 million operating budget, has been an unpredictable and declining source of funding for the agency for the past several years. While staff anticipated a further decline in this revenue from the amounts collected in Fiscal Year 2008, the decline in the quarterly installment due in December 2008 was substantially greater than projected. This situation, combined with a loss of revenue due to the impact of Hurricanes Dolly and Ike on horse and greyhound racetracks, has culminated in the unforeseeable cash flow shortfall.

If the Commission did not adopt this rule on an emergency basis, the earliest that the rule could take effect through the normal adoption process would be on May 3, 2009. However, the agency does not currently have enough operating funds on hand to pay staff on May 1 for the work to be performed during April, and does not project receiving enough from existing revenue sources to make up the difference. Without sufficient operating funds, the Commission risks having to lay off staff and cease the regulation of all live racing. This presents an imminent peril to the public welfare, for the cessation of live racing would endanger a large component of the Texas agricultural economy by preventing the payout of the purses and Accredited Texas Bred funds on which it depends. In 2008, Texas racetracks paid $38.6 million in purses and the Accredited Texas Bred fund paid $4.7 million in incentive awards. Owners and breeders use these funds to pay their trainers, jockeys, grooms, kennelmen, and veterinarians, among others, to care for and prepare their animals to race. Without these funds, these workers would be without employment and, depending upon the financial wherewithal of the individual owner or breeder, the care of the race animals could be placed in jeopardy. Racetrack association staff will also be adversely affected; without live racing, there will be no need for the racetracks to employ officials such as the racing director, starter, track superintendent, paddock judge, clerk of scales, and outriders. The Commission has approximately 14,000 occupational licensees who would be directly affected by the loss of pari-mutuel racing, and racing supports many individuals, such as breeders, who are not licensed by the Commission but nevertheless depend upon the industry for all or part of their livelihoods.

The Commission notes that the affected members of the industry did receive prior notice of the rule proposal and an opportunity to provide public comment to the Commission. The Commission's Working Group on Funding met on February 11, 2009, to discuss the rule. Representatives of five of the six inactive licensees were present at the meeting and were given an opportunity to comment. The remaining licensee was notified of that meeting and given a personal briefing by Commission staff.

The amendment is adopted pursuant to Government Code, §2001.034, which provides for the adoption of administrative rules on an emergency basis, without notice and comment, if the adopting agency finds that an imminent peril to the public health, safety, or welfare requires adoption of the rules on less than 30 days' notice. The amendment is also under Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §5.01, which requires the Commission to set fees by rule in amounts reasonable and necessary to cover the Commission's costs of regulating, overseeing, and licensing live and simulcast racing at racetracks.

The amendment implements Texas Civil Statutes, Article 179e.

§309.8. Racetrack License Fees.

(a) - (b) (No change.)

(c) Annual License Fee.

[~~(1) Active License Fee for State Fiscal Year Ending August 31, 2007. An association that is licensed and that is conducting live racing or simulcasting shall pay an annual active license fee. The fee is due to the Commission on April 16, 2007, for the State fiscal year ending August 31, 2007. The active license fee for a greyhound racing association is $80,000. The active license fee for a horse racing association is:~~]

[~~(A) for a Class 1 racetrack, $27,500;~~]

[~~(B) for a Class 2 racetrack, $15,000; and~~]

[~~(C) for a Class 3 or 4 racetrack, $5,000.~~]

(1) [~~(2)~~] Active License Fee for State Fiscal Years Beginning September 1, 2007, and thereafter. An association that is licensed and that is conducting live racing or simulcasting shall pay an annual active license fee. The fee is due to the Commission on January 31 of each State fiscal year. The active license fee for a greyhound racing association is $175,000. The active license fee for a horse racing association is:

(A) for a Class 1 racetrack, $45,000;

(B) for a Class 2 racetrack, $15,000; and

(C) for a Class 3 or 4 racetrack, $5,000.

(2) [~~(3)~~] Inactive License Fee for State Fiscal Year Ending August 31, 2009 [~~2007~~]. An association that is licensed but is not conducting live racing or simulcasting shall pay an inactive license fee in two separate payments. The fee is due to the Commission on September 1, 2008 and March 15, 2009 [~~April 16, 2007~~], for the State fiscal year ending August 31, 2009 [~~2007~~]. The total inactive license fee for a greyhound racing association is $150,000 to be paid $125,000 on September 1, 2008 and $25,000 on March 15, 2009 [~~$125,000~~]. The total inactive license fee for a horse racing association is:

(A) $150,000 for a Class 1 racetrack, to be paid $125,000 on September 1, 2008 and $25,000 on March 15, 2009 [~~$125,000~~];

(B) $100,000 for a Class 2 racetrack, to be paid $75,000 on September 1, 2008 and $25,000 on March 15, 2009 [~~$55,000~~]; and

(C) $50,000 for a Class 3 or 4 racetrack, to be paid $25,000 on September 1, 2008 and $25,000 on March 15, 2009 [~~$25,000~~].

(3) [~~(4)~~] Inactive License Fee for State Fiscal Years Beginning September 1, 2009 [~~2007~~], and thereafter. An association that is licensed but is not conducting live racing or simulcasting shall pay an inactive license fee. The fee is due to the Commission on September 1 of each year. The inactive license fee for a greyhound racing association is $150,000 [~~$125,000~~]. The inactive license fee for a horse racing association is:

(A) for a Class 1 racetrack, $150,000 [~~$125,000~~];

(B) for a Class 2 racetrack, $100,000 [~~$75,000~~]; and

(C) for a Class 3 or 4 racetrack, $50,000 [~~$25,000~~].

(d) - (e) (No change.)

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900897
Mark Fenner
General Counsel
Texas Racing Commission
Effective Date: February 27, 2009
Expiration Date: June 26, 2009
For further information, please call: (512) 833-6699

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. **[~~Square brackets and strikethrough~~]** indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 95. UNIFORM COMMERCIAL CODE

SUBCHAPTER H. OTHER NOTICES OF LIENS

1 TAC §95.602

The Office of the Secretary of State proposes amendments to 1 TAC §95.602, concerning Other Notices of Liens.

The purpose of the proposed amendments is to more accurately reflect current filing policies and procedures due to statutory requirements. Chapter 35, Texas Business and Commerce Code was repealed by the 80th Legislature and provisions for filing utility security instruments will be provided by Chapter 261, Texas Business and Commerce Code, effective April 1, 2009.

Randy Moes, Director, Uniform Commercial Code Section, has determined that, for the first five year period the proposed amendments are in effect, there will be no fiscal implications to the state or local government as a result of this rule proposal.

Mr. Moes also has determined that, for each year of the first five years the proposed amendments are in effect, the public benefit anticipated will be clarification in matters related to filing of Uniform Commercial Code documents with the Secretary of State and the submission of information requests. There will be no effect on large businesses, small businesses or micro-businesses. There will be no anticipated economic cost to individuals.

Comments on the proposals may be submitted to Randy Moes, Director, Uniform Commercial Code Section, P.O. Box 13193, Austin, Texas 78711-3193. Comments must be received by the Secretary of State no later than 5:00 p.m. Monday, April 13, 2009.

The amendments are proposed under Texas Business and Commerce Code, §§9.501 - 9.527; Texas Business and Commerce Code, Chapter 261; Texas Property Code, §§14.001 - 14.007; Texas Property Code, §§70.3031 - 70.307; Texas Property Code, §§70.401 - 70.410; Texas Agriculture Code, Chapter 128; Texas Agriculture Code, Chapter 188; Texas Code of Criminal Procedure, §42.22; and Texas Government Code, §§51.901 - 51.905, which provide the Secretary of State with the authority to adopt rules necessary to administer Texas Business and Commerce Code, Chapter 9, Subchapter D; Texas Business and Commerce Code, Chapter 261; Uniform Federal Lien Registration Act, Chapter 14; Texas Property Code, Chapter 70, Subchapters D and E; Texas Agriculture Code, Title 5, Subtitle H and Title 6, Subtitle E; and Texas Government Code, Chapter 51, Subchapter J.

No other statutes, articles or codes are affected by this proposal.

§95.602. Notice of Utility Security Instrument.

(a) Filing. A utility security instrument, an instrument that supplements or amends a utility security instrument, or a statement of name change, merger, or consolidation will be accepted for filing as defined in Chapter 261, Texas Business and Commerce Code. A separate notice is submitted for each utility security instrument and is filed and indexed within the UCC filing system. An instrument that supplements or amends a utility security, or a statement of name change, merger, or consolidation is filed and indexed within the UCC filing system as though it were a financing statement amendment and must include the identification of the initial file number (as defined in §95.101(5) of this title). An amendment to a utility security instrument shall be refused if the document's identification of the initial filing does not correspond to the identification number of a utility security instrument then active in the UCC information management system. [~~Utility security instruments and notices of name change, merger or consolidation will be accepted for filing as defined in Chapter 35, Texas Business and Commerce Code. Utility security instruments are filed and indexed within the UCC filing system. Notices of name change, merger or consolidation are filed as though they were financing statement amendments and must include identification of the initial file number (as defined in §95.101(8) of this title). A separate notice is submitted for each utility security instrument. An amendment to a utility security instrument shall be refused if the document's identification of the initial filing does not correspond to the identification number and file date of a utility security instrument then active in the UCC information management system.~~]

(1) Where to file. Utility security instruments, instruments supplementary or amendatory thereto, or a statement of name change, merger, or consolidation are filed with the filing office pursuant to Chapter 261 [~~35~~], Texas Business and Commerce Code.

(2) Fee. The required fee for filing and indexing each utility security instrument, an instrument that supplements or amends a utility security instrument, or a statement of name change, merger, or consolidation [~~notice of lien or certificate or notice affecting~~] is pursuant to §261.008 [~~Chapter 35.05~~], Texas Business and Commerce Code.

(3) Duration. The perfection and notice provided by the filing of a utility security instrument take effect on the date of filing and remain in effect without any renewal, refiling, or continuation statement until the interest granted as security is released by the filing of a termination statement, or a release of all or a part of the property, signed by the secured party pursuant to §261.005, Texas Business and Commerce Code. [~~The notice is effective until the interest granted as security is released by the filing of a termination signed by the secured party, and no renewal, refiling, or continuation statement shall be re-~~

~~quired to continue such effectiveness pursuant to Chapter 35.03, Texas Business and Commerce Code.~~]

(b) Mechanics of search. Search requests and reports are conducted pursuant to §261.009 [~~Chapter 35.06~~], Texas Business and Commerce Code and as described in §§95.500 - 95.504 of this title.

(c) Fee for search. The required fee for information from the filing office is pursuant to §261.009 [~~Chapter 35.06~~], Texas Business and Commerce Code and as described in §§95.111 - 95.112 of this title.

(d) Judicial Finding of Fact filing fee. The fee for a judicial finding of fact is pursuant to §51.905, Texas Government Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 2, 2009.

TRD-200900911
Lorna Wassdorf
Director of Business and Public Filings Division
Office of the Secretary of State
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 475-2710

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

16 TAC §309.8

The Texas Racing Commission (Commission) proposes amendments to 16 TAC §309.8, Racetrack License Fees, relating to the fees charged to pari-mutuel racetrack licensees. The changes to §309.8 increase the annual license fee for licensed but inactive pari-mutuel racetracks by $25,000 annually. For Fiscal Year 2009, the inactive racetracks are credited for the amounts already paid on September 1, 2008, and the additional $25,000 is due on March 15, 2009. For the fiscal years beginning on September 1, 2009, and beyond, the total inactive license fee will be due on September 1 of each year.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect the fiscal implication for state government is that the Texas Racing Commission will collect an additional $25,000 annually from each racetrack license that is not conducting live or simulcast racing. There are six licenses that currently meet these criteria, and four of these licenses are scheduled to begin racing during the next year. As a result, the five year fiscal impact to the state is estimated at $350,000. There will be no fiscal implications to local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to provide additional revenue to the Commission to administer the Texas Racing Act and support the regulation of live and simulcast racing.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required. Five of the six affected racetrack licensees are not operating businesses and report no profits or losses. The sixth, Corpus Christi Greyhound Race Track, reported losses for 2007 but is not currently operating. However, the Commission considered several alternative methods of raising additional revenue. These included raising annual fees on all racetracks, including active tracks, and increasing simulcasting and live racing fees. The Commission rejected these methods because the active racetracks already pay substantially more in total fees than the inactive tracks. The Commission also rejected the alternative of increasing fees on simulcasting and live racing because of the adverse impact these fees would have on the active racetracks' operations, including the possibility that some tracks would cancel some simulcasting dates. The Commission also considered increasing fees for occupational licenses, adding fees for administering trainers' tests, and adding new fees on requests to approve transfers of pecuniary interests in a racetrack license and on requests to change the location of a racetrack license. The Commission approved each of these proposals for publication in this issue of the *Texas Register* for public comment.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §5.01, which requires the Commission to set fees by rule in amounts reasonable and necessary to cover the Commission's costs of regulating, overseeing, and licensing live and simulcast racing at racetracks.

The amendment implements Texas Civil Statutes, Article 179e.

§309.8. Racetrack License Fees.

(a) - (b) (No change.)

(c) Annual License Fee.

[~~(1) Active License Fee for State Fiscal Year Ending August 31, 2007. An association that is licensed and that is conducting live racing or simulcasting shall pay an annual active license fee. The fee is due to the Commission on April 16, 2007, for the State fiscal year ending August 31, 2007. The active license fee for a greyhound racing association is $80,000. The active license fee for a horse racing association is:~~]

[~~(A) for a Class 1 racetrack, $27,500;~~]

[~~(B) for a Class 2 racetrack, $15,000; and~~]

[~~(C) for a Class 3 or 4 racetrack, $5,000.~~]

(1) [~~(2)~~] Active License Fee for State Fiscal Years Beginning September 1, 2007, and thereafter. An association that is licensed and that is conducting live racing or simulcasting shall pay an annual active license fee. The fee is due to the Commission on January 31 of

each State fiscal year. The active license fee for a greyhound racing association is $175,000. The active license fee for a horse racing association is:

(A) for a Class 1 racetrack, $45,000;

(B) for a Class 2 racetrack, $15,000; and

(C) for a Class 3 or 4 racetrack, $5,000.

(2) [~~(3)~~] Inactive License Fee for State Fiscal Year Ending August 31, 2009 [~~2007~~]. An association that is licensed but is not conducting live racing or simulcasting shall pay an inactive license fee in two separate payments. The fee is due to the Commission on September 1, 2008 and March 15, 2009 [~~April 16, 2007~~], for the State fiscal year ending August 31, 2009 [~~2007~~]. The total inactive license fee for a greyhound racing association is $150,000 to be paid $125,000 on September 1, 2008 and $25,000 on March 15, 2009 [~~$125,000~~]. The total inactive license fee for a horse racing association is:

(A) $150,000 for a Class 1 racetrack, to be paid $125,000 on September 1, 2008 and $25,000 on March 15, 2009 [~~$125,000~~];

(B) $100,000 for a Class 2 racetrack, to be paid $75,000 on September 1, 2008 and $25,000 on March 15, 2009 [~~$55,000~~]; and

(C) $50,000 for a Class 3 or 4 racetrack, to be paid $25,000 on September 1, 2008 and $25,000 on March 15, 2009 [~~$25,000~~].

(3) [~~(4)~~] Inactive License Fee for State Fiscal Years Beginning September 1, 2009 [~~2007~~], and thereafter. An association that is licensed but is not conducting live racing or simulcasting shall pay an inactive license fee. The fee is due to the Commission on September 1 of each year. The inactive license fee for a greyhound racing association is $150,000 [~~$125,000~~]. The inactive license fee for a horse racing association is:

(A) for a Class 1 racetrack, $150,000 [~~$125,000~~];

(B) for a Class 2 racetrack, $100,000 [~~$75,000~~]; and

(C) for a Class 3 or 4 racetrack, $50,000 [~~$25,000~~].

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900902
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 833-6699

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16 TAC §309.11, §309.12

The Texas Racing Commission (Commission) proposes two new rules, 16 TAC §309.11, Fees for Requests to Approve a Transfer of Pecuniary Interests, and §309.12, Fees for Requests to Approve Change of Location. Section 309.11 relates to the fees that a racing association must pay in order for the Commission to review a request to transfer an ownership interest in the association and for the Commission to reimburse the Department of Public Safety for the required background investigation. Section 309.12 relates to the fees that a racing association must pay in order for the Commission to review a request to change the association's location.

New §309.11 would require that the association pay a processing fee and a background investigation fee when requesting Commission approval to transfer an ownership interest. If the change amounts to a change in the control and/or majority interest in an association, the total fees range from $3,500 to $75,000. If the change is for more than a five percent ownership but less than a majority interest and does not cause a change in control, the total fees range from $175 to $1,500. If the change is for less than five percent ownership and does not cause a change in control, the fees range from $75 to $600. In each case, the fees are based on the class of license involved and are for the actual costs only; any excess amounts will be returned to the association, and any cost overruns will be billed to the association.

New §309.12 would require that the association pay a processing fee when requesting Commission approval to change location. The processing fee ranges from $7,500 to $100,000, depending upon the class of license. The fee is for the actual costs only; any excess amount will be returned to the association, and any cost overruns will be billed to the association.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that for the first five year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing the new rules.

Ms. King has also determined that for each year of the first five years the new rules are in effect the anticipated public benefit will be that the racing associations making these requests will bear the costs of processing the applications and conducting the background investigations. Previously, these costs had been distributed across all the racetracks through higher annual fees, simulcasting fees, and live racing fees. There will be no additional cost to individuals as a result of the proposal.

The rules will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed new rules.

All comments or questions regarding the proposed new rules may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The new rules are proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §5.01, which requires the Commission to set fees by rule in amounts reasonable and necessary to cover the Commission's costs of regulating, overseeing, and licensing live and simulcast racing at racetracks.

The new rules implement Texas Civil Statutes, Article 179e.

§309.11. Fees for Requests to Approve a Transfer of Pecuniary Interests.

(a) General Provisions. A license holder who requests Commission approval to transfer a pecuniary interest in a racetrack license must submit with the request a fee in an amount set by the Commission.

(b) Fees.

(1) The request fee is composed of a variable processing charge and investigation charge. The processing charge is the amount needed by the Commission to cover the administrative costs of processing the request. The investigation charge is the amount needed by the Commission to cover the costs incurred by the Department of Public Safety and Commission staff for conducting the background investigation on the proposed transferee. A license holder must pay all charges contemporaneously with filing the request. The Commission will take no action on a request under this section unless the requestor submits the total amount of the request fee with the request. The Commission shall hold the request fee in the state treasury in a suspense account. The Commission may transfer the processing funds due to the Commission to the Texas Racing Commission Fund as costs are incurred. If the actual costs to the Commission of processing the request or conducting the investigation exceed the amount deposited for the applicable charge, the requestor shall pay the remaining amount not later than 10 business days after receipt of a bill from the Commission. If the costs of processing the request or conducting the investigation are less than the amount of the charge, the Commission shall refund the excess not later than 10 business days after the Commission's decision on the request becomes final.

(2) The fees for a request for Commission approval to approve a transfer of pecuniary interests in a racetrack license that effects a change in the controlling interest of that license are as follows:

(A) The amount to be deposited for the processing charge for a horse racetrack request is:

(i) for a Class 1 racetrack, $50,000;

(ii) for a Class 2 racetrack, $25,000;

(iii) for a Class 3 racetrack, $10,000; and

(iv) for a Class 4 racetrack, $2,500.

(B) The amount to be deposited for the investigation charge for a horse racetrack request is:

(i) for a Class 1 racetrack, $25,000;

(ii) for a Class 2 racetrack, $10,000;

(iii) for a Class 3 racetrack, $1,500; and

(iv) for a Class 4 racetrack, $1,000.

(C) The amount to be deposited for the processing charge for a greyhound racetrack request is $50,000.

(D) The amount to be deposited for the investigation charge for a greyhound racetrack request is $25,000.

(3) The fees for a request for Commission approval to approve a transfer of pecuniary interests of 5.0% or more in a racetrack license, but that does not effect a change in the controlling interest of that license, are as follows:

(A) The amount to be deposited for the processing charge for a horse racetrack request is:

(i) for a Class 1 racetrack, $500;

(ii) for a Class 2 racetrack, $250;

(iii) for a Class 3 racetrack, $100; and

(iv) for a Class 4 racetrack, $50.

(B) The amount to be deposited for the investigation charge for a horse racetrack request is:

(i) for a Class 1 racetrack, $1,000;

(ii) for a Class 2 racetrack, $500;

(iii) for a Class 3 racetrack, $250; and

(iv) for a Class 4 racetrack, $125.

(C) The amount to be deposited for the processing charge for a greyhound racetrack request is $500.

(D) The amount to be deposited for the investigation charge for a greyhound racetrack license request is $1,000.

(4) The fees for a request for Commission approval to approve a transfer of pecuniary interests of less than 5.0% in a racetrack license and that does not effect a change in the controlling interest of that license are as follows:

(A) The amount to be deposited for the processing charge for a horse racetrack request is:

(i) for a Class 1 racetrack, $100;

(ii) for a Class 2 racetrack, $100;

(iii) for a Class 3 racetrack, $50; and

(iv) for a Class 4 racetrack, $25.

(B) The amount to be deposited for the investigation charge for a horse racetrack request is:

(i) for a Class 1 racetrack, $500;

(ii) for a Class 2 racetrack, $250;

(iii) for a Class 3 racetrack, $125; and

(iv) for a Class 4 racetrack, $50.

(C) The amount to be deposited for the processing charge for a greyhound racetrack request is $100.

(D) The amount to be deposited for the investigation charge for a greyhound racetrack request is $500.

§309.12. Fees for Requests to Approve Change of Location.

(a) General Provisions. A license holder who requests Commission approval to change the location of a racetrack license must submit with the request a fee in an amount set by the Commission.

(b) Fees.

(1) The request fee is composed of a variable processing charge. The processing charge is the amount needed by the Commission to cover the administrative costs of processing the request. A license holder must pay all charges contemporaneously with filing the request. The Commission will take no action on a request under this section unless the requestor submits the total amount of the request fee with the request. The Commission shall hold the request fee in the state treasury in a suspense account. The Commission may transfer the processing funds due to the Commission to the Texas Racing Commission Fund as costs are incurred. If the actual cost to the Commission of processing the request exceeds the amount deposited for the applicable charge, the requestor shall pay the remaining amount not later than 10 business days after receipt of a bill from the Commission. If the costs of processing the request are less than the amount of the charge, the Commission shall refund the excess not later than 10 business days after the Commission's decision on the request becomes final.

(2) The fees for a request for Commission approval to change the location of a racetrack license are as follows:

(A) The amount to be deposited for the processing charge for a horse racetrack request is:

(i) for a Class 1 racetrack, $100,000;

(ii) for a Class 2 racetrack, $50,000;

(iii) for a Class 3 racetrack, $15,000; and

(iv) for a Class 4 racetrack, $7,500.

(B) The amount to be deposited for the processing charge for a greyhound racetrack request is $100,000.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900903
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 833-6699

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CHAPTER 311. OTHER LICENSES
SUBCHAPTER A. LICENSING PROVISIONS
DIVISION 1. OCCUPATIONAL LICENSES

16 TAC §311.5

The Texas Racing Commission (Commission) proposes amendments to 16 TAC §311.5, License Fees. Section 311.5 relates to the fees the Commission charges for occupational licenses to participate in pari-mutuel racing.

The changes to §311.5 increase the occupational license fees by an amount varying from $5 to $25. The amendment also creates two new license types, Vendor Totalisator and Vendor/Totalisator Employee, with licensee fees of $500 and $50 respectively.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect the fiscal implication for state government will be an increase in revenue to the Commission of approximately $217,000 per year, or $1,085,000 for the full five years. There will be no fiscal impact to local government as a result of enforcing the amendment. Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to provide additional revenue to the Commission to administer the Texas Racing Act and support the regulation of live and simulcast racing.

The rule will have an adverse economic effect on small and micro-businesses. The Commission currently has approximately 7,100 occupational licensees that may qualify as small or micro-businesses. Of these, 6,500 are owners and/or trainers. The remainder are in occupations such as jockeys, veterinarians, farriers, and exercise riders. All of these licensees would see an increase in their annual fees by an amount ranging from $5 to $25. Before proposing to increase these fees, the Commission considered several alternative methods of increasing revenue. These included raising annual fees on all racetracks, including active tracks, and increasing simulcasting and live racing fees. The Commission rejected these methods because the active racetracks already pay substantial amounts in total fees. The Commission also rejected the alternative of increasing fees on simulcasting and live racing because of the adverse impact these fees would have on the active racetracks' operations, including the possibility that some tracks would cancel some simulcasting dates. The Commission also considered increasing fees for inactive racetrack licenses, adding fees for administering trainers' tests, and adding new fees on requests to approve transfers of pecuniary interests in a racetrack license and requests to change the location of a racetrack license. The Commission approved each of these proposals for publication in this issue of the *Texas Register* for public comment.

There may be negative impacts upon employment conditions in this state as a result of the proposed amendment. For many employees, the employer pays the occupational licensing fee. Since some of these fees will be applied to entry-level positions with higher levels of turnover, some employers may resist hiring new workers or require new workers to pay for their own licenses.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §5.01, which requires the Commission to set fees by rule in amounts reasonable and necessary to cover the Commission's costs of regulating, overseeing, and licensing live and simulcast racing at racetracks.

The amendment implements Texas Civil Statutes, Article 179e.

§311.5. License Fees.

(a) - (b) (No change.)

(c) The fee for an occupational license is as follows:

Figure: 16 TAC §311.5(c)
[~~Figure: 16 TAC §311.5(c)~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900904
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 833-6699

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SUBCHAPTER B. SPECIFIC LICENSES

16 TAC §311.104

The Texas Racing Commission (Commission) proposes amendments to 16 TAC §311.104, Trainers. Section 311.104 relates to the qualifications and responsibilities of trainers.

The changes to §311.104 create a $50 fee for administering the written and practical examination to become a trainer. It also pro-

vides that failure to timely reschedule a missed exam will result in loss of the testing fee.

Charla Ann King, Executive Director, has determined that for the first five year period the amendment is in effect there will be an increase in revenue to the Commission of approximately $17,500. There will be no fiscal implications for local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit is to provide additional revenue to the Commission to administer the Texas Racing Act and support the regulation of live and simulcast racing. It will also reduce unnecessary expenses caused by trainer candidates who have requested examinations before being adequately prepared and who have missed scheduled examinations without adequate notice.

The rule may have an adverse economic effect on small or micro-businesses. Approximately 70 trainer candidates take the trainer examination each year, and upon successful completion of the examination, many of these candidates will operate as a small or micro-business. This rule change will impose a small financial barrier to entry into the field. The Commission has considered several alternative methods of raising additional revenue and of reducing costs, including raising annual fees on active racetracks and increasing simulcasting and live racing fees. The Commission rejected these methods because the active racetracks already pay substantial amounts in fees. The Commission also rejected the alternative of increasing fees on simulcasting and live racing because of the adverse impact these fees would have on the active racetracks' operations, including the possibility that some tracks would cancel some simulcasting dates.

The Commission considered increasing fees for inactive racetrack licenses, adding new fees on requests to approve transfers of pecuniary interests in a racetrack license, and adding new fees on requests to change the location of a racetrack license. To reduce costs, the Commission has considered reducing the number of greyhound judges required for each greyhound race from three to two. The Commission approved each of these proposals for publication in this issue of the *Texas Register* for public comment.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §5.01, which requires the Commission to set fees by rule in amounts reasonable and necessary to cover the Commission's costs of regulating, overseeing, and licensing live and simulcast racing at racetracks.

The amendment implements Texas Civil Statutes, Article 179e.

§311.104. Trainers.

(a) Licensing.

(1) (No change.)

(2) The standard for passing the written examination must be printed on the examination. A $50 non-refundable testing fee is assessed for administering the written and practical examinations. The fee is due and payable at the time the first examination appointment is scheduled. A minimum of 48 hours advance notice is required to reschedule an examination appointment without loss of the testing fee. An applicant who fails to timely reschedule an examination appointment must pay a new testing fee to reschedule the appointment. An applicant who fails the written examination may not take the examination again before the 60th day after the date the applicant failed the examination. An applicant who fails the practical examination may not reschedule the practical examination again before the 180th day after the applicant failed the practical examination. An applicant who fails the practical examination for a second time may not reschedule another practical examination for 365 calendar days after the day the applicant failed the first practical examination and the applicant must pay an additional $50 non-refundable testing fee. The Commission may waive the requirement of a written and/or practical examination for a person who has a current license issued by another pari-mutuel racing jurisdiction. If a person for whom the examination requirement was waived demonstrates an inability to adequately perform the duties of a trainer, through excessive injuries, rulings, or other behavior, the stewards or racing judges may require the person to take the written examination. If such a person fails the examination, the stewards or racing judges shall suspend the person's license for 60 days with reinstatement contingent upon passing the written examination.

(3) - (4) (No change.)

(b) - (k) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 2, 2009.

TRD-200900905
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 833-6699

CHAPTER 315. OFFICIALS AND RULES FOR GREYHOUND RACING

SUBCHAPTER A. OFFICIALS

DIVISION 1. APPOINTMENT OF OFFICIALS

16 TAC §315.1

The Texas Racing Commission proposes an amendment to 16 TAC §315.1, Required Officials. Section 315.1 relates to the officials that must be present at each pari-mutuel greyhound race.

The change to §315.1 would require that at least two judges be present for each race instead of three.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect there will be a net reduction in costs to state government of up to $170,000. There will be no fiscal implications for local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to allow the Commission to reduce costs by designating three judges for the meet as a whole, but providing only two judges for specific performances. While three judges would be available to sit on a panel in case of a ruling, the duties of overseeing many race performances can be satisfied with only two judges.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing.

The amendment implements Texas Civil Statutes, Article 179e.

§315.1. Required Officials.

(a) The following officials must be present at each greyhound race conducted in this state:

(1) at least two [~~three~~] racing judges;

(2) - (13) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 2, 2009.

TRD-200900906
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 30. ADMINISTRATION
SUBCHAPTER AA. COMMISSIONER OF EDUCATION: GENERAL PROVISIONS

19 TAC §30.1001

The Texas Education Agency (TEA) proposes an amendment to §30.1001, concerning petitioning for adoption of rule changes. The section establishes in rule the process for petitioning the adoption of changes to commissioner of education rules, as required by Texas Government Code, §2001.021. The proposed amendment would adopt in rule the form to be used when an individual elects to petition adoption of commissioner rule changes in the Texas Administrative Code.

Texas Government Code, §2001.021, requires that procedures to petition for the adoption of rule changes be adopted by rule. To comply with statute, the commissioner adopted 19 TAC Chapter 30, Administration, Subchapter AA, Commissioner of Education: General Provisions, §30.1001, Petition for Adoption of Rule Changes, effective September 23, 2004.

During the recent statutorily-required review of agency rules, the TEA legal counsel determined that the form used to petition for adoption of a rule change should be adopted in rule as a figure. Following the advice of TEA legal counsel, the proposed amendment to 19 TAC Chapter 30, Administration, Subchapter AA, Commissioner of Education: General Provisions, §30.1001, Petition for Adoption of Rule Changes, would adopt in rule as a figure the form used to petition for the adoption of rule changes to ensure compliance with statute and increase public awareness. The form has been posted on the TEA rules website since initial adoption of 19 TAC §30.1001 in September 2004.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be to help increase public awareness of the commissioner of education's procedures for petitioning rule changes by adopting in rule the petition form. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins March 13, 2009, and ends April 13, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on March 13, 2009.

The amendment is proposed under the Texas Government Code, §2001.021, which authorizes a state agency to by rule prescribe the form for a petition and the procedure for the submission, consideration, and disposition.

The proposed amendment implements the Texas Government Code, §2001.021.

§30.1001. Petition for Adoption of Rule Changes.

(a) In accordance with Texas Government Code, §2001.021, any interested person may petition for the adoption, amendment, or repeal of a rule of the commissioner of education by filing a petition on a form provided in this subsection. The petition shall be signed and submitted to the commissioner of education.
Figure: 19 TAC §30.1001(a)

[(b) A petition under this section shall be in writing and shall contain:]

[(1) the petitioner's name, address, telephone number, and signature;]

[(2) the date the petition is submitted;]

[(3) the chapter and subchapter in which, in the petitioner's opinion, the rule belongs;]

[(4) the proposed rule text of a new rule or the text of the proposed rule change prepared in a manner to indicate the words to be added or deleted from the current text, if any;]

[(5) a statement of statutory or other authority under which the rule is to be promulgated; and]

[(6) a brief explanation of why the rule action is necessary or desirable.]

(b) [(c)] The commissioner or the commissioner's designee shall evaluate the merits of the proposal.

(c) [(d)] In accordance with the Texas Government Code, §2001.021, the commissioner or the commissioner's designee shall respond to the petitioner within 60 days of receipt of the petition. The response shall:

(1) advise that rulemaking proceedings will be initiated; or

(2) deny the petition, stating the reasons for its denial.

(d) [(e)] If the commissioner initiates rulemaking procedures in response to a petition, the [version of the] rule text which the commissioner proposes may differ from the rule text [version] proposed by the petitioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900892
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.5

The Texas Appraiser Licensing and Certification Board (TALCB) proposes an amendment to §153.5 regarding Fees. The proposed amendment would waive licensing and certification fees for employees of the TALCB who only use the license or certification for Board appraisal work.

Devon V. Bijansky, Counsel, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no anticipated impact on local or state employment as a result of implementing the section. There is no anticipated impact on small businesses or micro-businesses as a result of implementing the proposed amendment. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

Ms. Bijansky has also determined that the anticipated public benefit as a result of this amendment is an enhanced ability to fulfill the Board's mission due to availability of additional funds without additional cost to the public.

Comments on the proposal may be submitted to Devon V. Bijansky, Counsel for the Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under the Texas Occupations Code, §1103.156, Fees.

The statute affected by this proposal is Texas Occupations Code, Chapter 1103. No other statute, code, or article is affected by the proposed amendment.

§153.5. Fees.

(a) - (c) (No change.)

(d) Licensing fees are waived for members of the TALCB staff who must maintain a license or certification for employment with the Board only and are not also using the license or certification for outside employment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2009.

TRD-200900845
Devon V. Bijansky
Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 465-3900

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22 TAC §153.20

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to §153.20 regarding revocation, suspension, or denial of license or certification. The proposed amendments clarify that a person seeking reinstatement of a license or certification must meet all requirements that would apply if the person's license or certification was expired. The proposed amendments also allow the Board to pursue credit card chargebacks and other reversed payments in the same manner as bad checks.

Devon V. Bijansky, Counsel, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no an-

ticipated impact on local or state employment as a result of implementing the section. There is no anticipated impact on small businesses or micro-businesses as a result of implementing the proposed section. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Bijansky has also determined that the anticipated public benefit as a result of this section is increased clarity regarding the requirements for reinstatement of a license or certification, as well as equal application of policies regarding reversed payments to the Board.

Comments on the proposal may be submitted to Devon V. Bijansky, Counsel for the Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under the Texas Occupations Code, Chapter 1103, Subchapter D, Board Powers and Duties.

The statute affected by this proposal is Texas Occupations Code, Chapter 1103. No other statute, code, or article is affected by the proposed amendments.

§153.20. Guidelines for Revocation, Suspension, or Denial of License or Certification.

(a) The board may suspend or revoke a license, certification, authorization or registration issued under provisions of this Act or deny issuing a license, certification, authorization or registration to an applicant at any time when it has been determined that the person applying for or holding the license, certification, authorization, or registration:

(1) - (13) (No change.)

(14) has had a final civil judgment [~~judgement~~] entered against him or her on any one of the following grounds:

(A) - (C) (No change.)

(15) has failed to make good on a payment [~~check~~] issued to the board within thirty days after the board has mailed a request for payment by certified mail to the licensee's last known business address as reflected by the board's records;

(16) has knowingly or willfully [~~wilfully~~] engaged in false or misleading conduct or advertising with respect to client solicitation;

(17) - (23) (No change.)

(b) - (c) (No change.)

(d) A person applying for reinstatement after revocation or surrender of a license or certification must comply with all requirements that would apply if the license or certification had instead expired.

(e) [~~(d)~~] The provisions of this section do not relieve a person from civil liability or from criminal prosecution under the Act or under the laws of this State.

(f) [~~(e)~~] The board may not investigate under this section a complaint submitted either more than two years after the date of discovery or more than two years after the completion of any litigation involving the incident, whichever event occurs later, involving the state licensed real estate appraiser, provisional licensed appraiser, state certified real estate appraiser, or appraiser trainee who is the subject of the complaint.

(g) [~~(f)~~] Except as provided by Tex. Gov. Code §402.031(b) and Tex. Penal Code §32.32(d), there shall be no undercover or covert investigations conducted by authority of the Act.

(h) [~~(g)~~] All board members, officers, directors, and employees of this agency shall be held harmless with respect to any disclosures made to the board in connection with any complaints filed with the board.

(i) [~~(h)~~] A license, certification, authorization or registration may be revoked or suspended by the Attorney General or other court of competent jurisdiction for failure to pay child support under provisions of Chapter 232 of the Texas Family Code.

(j) [~~(i)~~] A certified or licensed appraiser who files a complaint against another certified or licensed appraiser that the board determines to be frivolous is liable for a civil penalty. At the request of the board, the attorney general or a district or county attorney may institute a civil action in district court to collect a penalty under this subsection. A civil penalty under this subsection may not be less than $500 or more than $10,000. A civil penalty recovered in a suit instituted under this subsection shall be deposited in the state treasury to the credit of the general revenue fund.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2009.

TRD-200900846
Devon V. Bijansky
Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 465-3900

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS
SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.212

The Texas Real Estate Commission (TREC) proposes an amendment to §535.212 concerning Education and Experience Requirements for an Inspector License. The amendment updates a reference to the recently revised standard inspection report form, which was not changed when the REI 7A-0 form was replaced by the REI 7A-1, effective February 1, 2009.

Devon V. Bijansky, Assistant General Counsel, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendment. There is no anticipated economic cost to persons who are required to comply with the proposed amendment. There is no anticipated impact on small businesses, micro-businesses, or local or state employment as a result of implementing the amendment.

Ms. Bijansky also has determined that for each year of the first five years the amendment as proposed is in effect, the public benefit anticipated as a result of enforcing the sections is to ensure that education providers are offering training, and persons pursuing licensure as inspectors are properly trained, in the use of the current inspection report form.

Comments on the proposed amendment may be submitted to Devon V. Bijansky, Assistant General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the proposed amendment.

§535.212. Education and Experience Requirements for an Inspector License.

(a) Education requirements.

(1) - (4) (No change.)

(5) The following subjects shall be considered core real estate inspection courses for purposes of additional education requirements under subsection (b)(1)(B) of this section.

(A) - (I) (No change.)

(J) Standard Report Form/Report Writing, which shall include the following topics:

(i) required use of report form REI 7A-1[~~0~~];

(ii) - (vi) (No change.)

(K) (No change.)

(6) - (9) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 2, 2009.

TRD-200900910
Devon V. Bijansky
Assistant General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 465-3900

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 21. WATER QUALITY FEES

30 TAC §21.3

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §21.3.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Water Resource Management Account 153 (Account 153) is the primary source of state funding for essentially all water program related activities of the commission. In 2001, the 77th Legislature passed House Bill 2912 which provided that revenues deposited to Account 153 would be available to the Legislature and the TCEQ to support activities associated with ensuring the protection of the state's water resources. Account 153 supports a wide range of activities associated with water rights, storm water, public drinking water, Total Maximum Daily Load development, water utilities, dam safety, wastewater, river compacts, water availability modeling, water assessment, Confined Animal Feeding Operations, sludge, Clean Rivers Program, and groundwater protection. Historically, the agency has used Account 153 as well as the majority of its general revenue appropriations to support its water program activities.

General revenue appropriations to the commission have declined from the $51 million received in the 2004 - 2005 biennium. In addition, many of the water related fees that the agency does assess have not increased in seven to ten years. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. As a result, the fund balance is close to being depleted. The current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to cover the costs of its water program activities in fiscal year (FY) 2010 - 2011.

Given the declining availability of funds in Account 153, the commission reviewed those water related fees it has the authority to change. After a review of the commission's existing water related fees, the commission is proposing revisions to the consolidated water quality (CWQ) fee, the public health service (PHS) fee, and the water use assessment fee (WUF) to generate sufficient revenue to cover the costs of its water program activities beginning in FY 2010. These fees were identified for a fee increase because, in terms of numbers and categories of fee payers, they represent some of the most broad-based water related fees the agency assesses, revision of these three fees does not require statutory changes and their revenue stream represents significant water fee collections.

With the depletion of fund balances in Account 153, the commission is proposing changes to ensure that funds to support water program activities will be available in FY 2010. Proposing this change at this time is intended to provide ample notification to potentially affected fee payers to prepare for changes in FY 2010 billings.

This proposal would amend Chapter 21, Water Quality Fees, to ensure that there are sufficient funds in FY 2010 to carry out the tasks required to protect the water resources of the state. In a corresponding rulemaking published in this issue of the *Texas Register,* the commission proposes to amend 30 TAC Chapter 290, Public Drinking Water.

Within the scope of this proposal, this rulemaking may be adjusted in response to any action taken by the 81st Legislature affecting the commission's water fee structure and appropriations. Possible legislative actions could include an increase or decrease in the amount of general revenue given to the commission compared to previous bienniums, and an adjustment to the cap on the fee for individual wastewater discharge permits. An increase in the amount of the cap or an elimination of the cap would likely result in changes in fee assessments for a significant portion of fee payers. The amount of general revenue appropriated to the agency to support water program activities could also likely affect the final assessment for both the CWQ and the PHS fee assessments, but will not affect the WUF fee included in this rule package.

SECTION DISCUSSION

The commission proposes to amend §21.3(b)(2) by deleting the reference to a maximum fee for wastewater permits and aquaculture permits in this paragraph and instead referring to the amount as provided in the Texas Water Code (TWC). The existing statutory caps of $75,000 for wastewater permits and $5,000 for aquaculture permits are set forth in TWC, §26.0291 and §29.0292, respectively. The commission proposes this change to refer to any statutory caps and to allow for the possibility that the caps may be amended by the legislature in the future. In this paragraph, the commission also proposes increasing the minimum fee for active permits to $1,250 and for inactive permits to $620.

The commission proposes to amend §21.3(b)(5) by revising the fee rate schedule to delete the fixed dollar amount for each factor and in its place provide a maximum amount that could be assessed for each factor. The maximum amount proposed for each factor is an increase above the fixed dollar amount that currently exists in the rules. The amount applied to each factor will be determined by the annual appropriations and other costs from Account 153, in addition to any statutory cap on fees for individual permits, and would be applied uniformly to all permits subject to the particular factor being applied. In §21.3(b)(5)(A), the commission proposes to increase the amount for contaminated flow from a fixed amount of $700 per million gallons per day (mgd) to a maximum amount that could be assessed of $1,090 per mgd. In addition, the commission proposes in §21.3(b)(5)(A) to define the acronym mgd as million of gallons per day. In §21.3(b)(5)(B), the commission proposes to increase the amount for uncontaminated flow from a fixed amount of $10 per mgd to a maximum amount that could be assessed of $18 per mgd. In §21.3(b)(5)(C), the commission proposes to increase the amount for traditional pollutants from a fixed amount of $15 per pound per day to a maximum amount that could be assessed of $23 per pound per day. In §21.3(b)(5)(D)(i), the commission proposes to increase the amount for industrial discharges with a toxic rating of Group I from a fixed amount of $200 to a maximum amount that could be assessed of $310. In §21.3(b)(5)(D)(ii), the commission proposes to increase the amount for industrial discharges with a toxic rating of Group II from a fixed amount of $700 to a maximum amount that could be assessed of $1,090. In §21.3(b)(5)(D)(iii), the commission proposes to increase the amount for industrial discharges with a toxic rating of Group III from a fixed amount of $1,050 to a maximum amount that could be assessed of $1,640. In §21.3(b)(5)(D)(iv), the commission proposes to increase the amount for industrial discharges with a toxic rating of Group IV from a fixed amount of $1,575 to a maximum amount that could be assessed of $2,460. In §21.3(b)(5)(D)(v), the commission proposes to increase the amount for industrial discharges with a toxic rating of Group V from a fixed amount of $3,150 to a maximum amount that could be assessed of $4,910. In §21.3(b)(5)(D)(vi), the commission proposes to increase the amount for industrial discharges with a toxic rating of Group VI from a fixed amount of $6,300 to a maximum amount that could be assessed of $9,830. In §21.3(b)(5)(E), the commission proposes to increase the amount for a major permit designation from a fixed amount of $2,000 to a maximum amount that could be assessed of $3,120. In §21.3(b)(5)(F), the commission proposes to increase the amount for a storm water authorization from a fixed amount of $500 to a maximum amount that could be assessed of $780. The commission proposes these changes to allow the commission the ability to assess fees as needed to cover, in part, the cost of its water program activities. The increase will be used to fund the water program activities of the state based on the appropriation levels set by the state legislature.

The commission proposes to amend §21.3(b)(6)(A) by increasing the minimum amount for an active land application permit fee from $800 per year to $1,250 per year. The commission proposes this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission proposes to amend §21.3(b)(6)(B) by increasing the minimum amount for an inactive permit fee from $400 per year to $620 per year. The commission proposes this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission proposes to amend §21.3(b)(6)(C) by increasing the fee for an active storm water permit which authorizes the discharge of storm water only, with no other wastewater, from a fixed amount of $500 to a maximum amount that could be assessed of $780. The commission proposes this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission proposes to amend §21.3(b)(6)(D)(iii) by deleting the reference to a maximum fee for aquaculture permits in this paragraph and instead referring to the amount as provided in the TWC. The existing statutory cap of $5,000 is set forth in TWC, §26.0292. The commission proposes this change to refer to any statutory cap and to allow for the possibility that the cap may be adjusted by the legislature in the future.

The commission proposes to amend §21.3(b)(7), which provides the commission authority to adjust CWQ fees through the use of a multiplier. The commission proposes to change the current multiplier from 1 to an amount up to a maximum of 1.75 to give the commission sufficient flexibility in assessing fees within the specified parameters. The use and amount of the multiplier will be determined by the annual appropriations and other associated costs from Account 153, in addition to any statutory cap on fees for individual permits, and would be applied uniformly to all permits subject to the water quality fee. Additionally, the commission proposes to add a requirement that the executive director report to the commission as part of the approval of the annual operating budget the multiplier that will be applied for the upcoming fiscal year.

The commission proposes to amend §21.3(c)(3), which provides the commission authority to assess a fee for consumptive use under a water right that authorizes diversion of more than 250 acre-feet per year. The existing rule provides that the fee for each water right authorizing diversion of more than 250 acre-feet per year for consumptive use is $.22 per acre-foot up to 20,000 acre-feet, and $.08 per acre-foot thereafter. Under the proposed change, a fee of $.385 per acre-foot would be assessed for all water rights for consumptive use that authorize diversion of more than 250 acre-feet per year, including those above 20,000 acre-feet. The proposed change would delete the provision that reduces the fee to $.08 for water rights above 20,000 acre-feet per year. The amount of the increase from $.22 to $.385 reflects the application of a factor of 1.75, which is the maximum amount proposed as a multiplier for the CWQ fee.

The commission proposes to amend §21.3(c)(5) by combining paragraphs (5) and (6) to eliminate a stand-alone provision for the fee for water rights for hydropower purposes and incorporate it into the non-consumptive use paragraph. By incorporating the fee for water rights for hydropower purposes into the non-con-

sumptive use paragraph the fee amount of $.04 per acre-foot in the existing rule would change to $.021 per acre-foot. Additionally, the proposed rule would delete the tiered structure that exists for both the non-consumptive use paragraph and the water rights for hydropower purposes paragraph. That structure provided for reduced fee amounts for usage above a certain threshold. Under the proposed rule the minimum threshold of 2,500 acre-feet per year for assessing a fee is eliminated. The proposed change does not affect the exemption from the fee for a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts. The subsequent paragraph is renumbered to reflect this proposed change.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Chris Hayden, financial analyst with the Chief Financial Officer Division, determined that for the first five-year period the proposed rule is in effect there will be fiscal implications for the agency, with an increase in fee revenue estimated to be $15.7 million to Account 153. The proposed amendment is not expected to have significant fiscal implications for other state agencies. No significant fiscal implications are anticipated for units of local governments since any fee increases for facilities owned or operated by units of local government are anticipated to be passed on to their customers. The overall increase in fee revenue statewide collected from units of local government is anticipated to be approximately $7.8 million annually in additional fees.

The proposed rule will increase revenue to Account 153. The current revenue from all assessments is approximately $18.9 million of which units of state and local government contribute $9 million. The proposed increase is necessary to continue to adequately fund the agency's water program activities. TCEQ is currently supporting the water programs using the existing fund balances from Account 153 without replenishing the fund balance.

Fee adjustments under the proposed rule

The calculations for the CWQ fees used in preparing this fiscal note were performed using the maximum dollar amounts proposed for each factor in addition to using a multiplier of 1.56 and assumes the commission will receive no general revenue for water program activities. Although the maximum amounts for each factor were needed to generate sufficient revenue with the current statutory cap on individual permits, if the legislature raised the cap of $75,000 per permit, the use of a range would enable the commission to lower amounts for the factors which in many instances would result in lowering overall fee amounts. While an increase in the cap would allow for lowering fee rates and result in lowering overall fee amounts for individual permit holders in the proposed rule, permits that are currently at the $75,000 cap, would experience an increase in fee cost.

Water right holders paying the WUF will pay a fee of $.385 per acre-foot for consumptive use and $.021 per acre-foot for non-consumptive use, including, water rights for hydropower purposes.

Other state and local governments would be assessed approximately $7.4 million in additional CWQ fees annually under the proposed rule. The average increase for the approximately 1,800 state and local government permits is $4,100 per year. The largest increase for any individual permit under the proposed rule is for a local government and is approximately $47,000. The largest overall increase for any local government is $678,000 because the local government has multiple individual permits. The proposed rule increases the various fee assessments and fee minimums by approximately 56% and adjusts the fee multiplier to an amount not to exceed 1.75. The current rule identifies the current statutory cap of $75,000 per individual permit and $5,000 for aquaculture permits. The proposed rule removes the specific dollar amount for the CWQ caps and replaces it with language referring to the statute to determine the caps in the event that the legislature amends any of the current caps that exist for individual permits and aquaculture permits. There are 30 state and local government permits that are at the current statutory cap and absent a change to the cap will not be affected by the proposed rule.

The WUF increase would bring in an estimated $675,000 per year in additional revenue and would affect approximately 115 state and local governments with the average increase of $5,300 per year. Local governments will fund 83% of the total increased amount with river authorities accounting for 48% of the total, and municipalities accounting for 13% of the total.

It is anticipated that units of local government will pass the CWQ increase on to the customer in the waste water utility bill and, therefore, the fee increases will not be a significant cost to units of state or local governments. It is also anticipated that units of local government will pass the WUF increase on to the customer. Staff does not anticipate increases to customer rates will have a significant impact on individual permit holders or water rights holders.

The increase will be used to fund the water program activities of the state based on the appropriation levels set by the state legislature. The final CWQ fee assessment will be applied uniformly to all fee payers and will be determined by the annual appropriations and other associated costs from Account 153, in addition to any statutory cap on fees for individual permits.

PUBLIC BENEFITS AND COSTS

Mr. Hayden determined for each year of the first five years the proposed rule is in effect, the public benefit will be the continued protection of the state's water resources by adequate funding of the state's water programs. It is anticipated that individual permit holders and water rights holders will pass any increase on to their respective customers.

Fee adjustment under the proposed rule

Most entities that currently pay the CWQ fee and the WUF will be affected. Individual permits and individual aquaculture permit holders that are at the statutory cap will not see an increase in CWQ fees under the proposed rule unless there is a change to either or both of the statutory caps by the state legislature. Statewide the cost increase to the 1,500 individual CWQ permits owned by businesses and individuals is projected to be $7.6 million annually with an average increase of $5,000 in fees. The increase for any single individual permit is limited to the $75,000 cap set in statute. The increase in cost in WUF fees for the approximately 81 water rights owned by businesses and individuals is projected to be $73,000 with the average increase of $901 per water right. The proposed rule deletes the reference to a specific dollar amount and instead will refer to the statute for the cap for the CWQ fee to allow for the possibility that the legislature changes this cap in the future. These business-owned and individually-owned permits will be subject to the same CWQ fee rate structure as those experienced by local governments. It is anticipated that the non-governmental permit holders will pass

the increase on to their customer and, therefore, the proposed rule is not expected to have a significant fiscal impact on these waste water permit holders or water right holders.

The increase in revenue will be used by the commission to fund the water programs based on the appropriation levels set by the state legislature. The final CWQ fee rate assessment will be applied uniformly to all permits subject to the water quality fee and will be determined by the annual appropriations and other associated costs from Account 153, in addition to any statutory cap on fees for individual permits.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impact to the estimated 640 small or micro-businesses, which have an individual waste water permit subject to the proposed rule since any CWQ fee increase is expected to be recouped in pricing of products or services. The proposed amendment is anticipated to increase CWQ fees by approximately $3 million with an average annual increase of approximately $4,700 per year. These small business permit holders will be subject to the same fee rate structure as those experienced by local governments and large businesses. The 33 small or micro-businesses, which have water rights are anticipated to have an approximate increase of $4,500 per year with an average annual increase of $136 per permit per year. Small or micro-business permit holders account for only 1% of the total fee revenue and less than 1% of the increase amount.

It is anticipated that the individual permit holders and water right holders will pass the increase on to the customer. The increase will be used to fund the water programs of the state based on the appropriation levels set by the state legislature. The final CWQ fee rate assessment will be applied uniformly to all permits subject to the water quality fee and will be determined by the annual appropriations and other associated costs from Account 153, in addition to any statutory cap on fees for individual permits.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed the proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect. Small or micro-businesses are expected to recover any increased costs by passing any fee increases to their customers.

The increase in revenue for the commission will be used to fund the water program activities of the state based on the appropriation level set by the state legislature. The final CWQ fee rate assessment will be applied uniformly to all permits subject to the water quality fee and will be determined by the annual appropriations and other associated costs from Account 153, in addition to any statutory cap on fees for individual permits.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed the proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect the local economy in a material way for the first five years that the proposed rulemaking is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the sate or a sector of the state.

The proposed rule is part of a larger proposed rulemaking to increase fees in order to provide funding for the commission's water program activities. The corresponding rulemaking, proposed amendments to Chapter 290, Public Drinking Water, is published in this issue of the *Texas Register.* The proposed amendment to Chapter 21 does not meet the definition of "major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with the statutory requirements set forth in the TWC. Therefore, the commission finds that this rulemaking is not a "major environmental rule."

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, it is not subject to the Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225 only applies to a state agency's adoption of a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirements of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or a contract between the state and an agency or representative of the federal government to implement a state and federal program; or, 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the proposed rulemaking does not exceed an express requirement of state law, but rather seeks to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with state law. Third, the proposed rulemaking does not exceed a requirement of a delegation agreement or a contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections which are cited in the STATUTORY AUTHORITY section of this preamble.

Based upon the foregoing, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invites public comment on the draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The commission determined that the

proposed rulemaking does not constitute a taking. The specific purpose of the proposed rulemaking is to provide the commission with the additional revenue necessary to operate its water program activities in a manner that is consistent with the statutory requirements set forth in the TWC.

This rulemaking substantially advances this stated purpose by adjusting the factors by which the fees are calculated to provide funding at a level that is sufficient to support a portion of the commission's water program.

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulation does not affect a landowner's rights in private real property because the rulemaking does not burden, restrict, or limit the owner's right to real property, and does not reduce the market value of real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. The proposed rulemaking will not burden private real property because it amends fee rules which relate to funding for the commission's water program activities.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on April 7, 2009, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2009-007-021-PR. The comment period closes April 13, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Kathleen Ramirez, Water Supply Division, (512) 239-6757.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, including water programs; §5.102, concerning general powers of the commission; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §5.701, which provides statutory direction regarding the use of fees collected for deposit to the water resource management account; §26.011, which requires the commission to control water quality in the state; §26.0135, which directs the commission to apportion, assess, and recover reasonable costs of administering the water quality management program under that section; §26.0291, which establishes a water quality fee and water use fee for wastewater permit holders and water rights holders; and, §26.0292, which addresses the manner in which the commission assesses fees for aquaculture facilities.

The proposed amendment implements TWC, §§26.011, 26.0135, 26.0291, and 26.0292.

§21.3. Fee Assessment.

(a) The fee calculation is based on the authorized limits contained in wastewater permits and water rights as of September 1 each year, without regard to the actual amount or quality of effluent discharged or the actual amount of water used.

(b) Assessment for wastewater permits.

(1) An annual fee is assessed against each person holding a wastewater permit. A separate fee is assessed for each wastewater permit.

(2) The maximum fee which may be assessed any permit, including an aquaculture permit, is the amount, if any, set forth in Texas Water Code, Chapter 26 [~~$75,000, except that the maximum for an aquaculture permit is $5,000~~]. The minimum fee for an active permit is $1,250 [~~$800~~]. The minimum fee for an inactive permit is $620 [~~$400~~].

(3) In assessing a fee under this chapter, the commission considers the following factors:

(A) flow volume, and type;

(B) traditional pollutants;

(C) toxicity rating;

(D) storm water discharge;

(E) major designation;

(F) active or inactive status;

(G) discharge or retention;

(H) the designated uses and ranking classification of waters affected by waste discharges; and

(I) the costs of administering the following commission programs:

(i) water quality administration, including inspection of waste treatment facilities and enforcement of the provisions of Texas Water Code (TWC), Chapter 26, the rules and orders of the commission, and the provisions of commission permits governing waste discharges and waste treatment facilities;

(ii) the Texas Clean Rivers Program, under TWC, §26.0135, which monitors and assesses water quality conditions that support water quality management decisions necessary to maintain and improve the quality of the state's water resources (as defined in TWC, §26.001(5)).

(4) For the purpose of fee calculation, chemical oxygen demand (COD) and total organic carbon (TOC) are converted to biochemical oxygen demand (BOD) values and the highest value is used for fee calculation. The conversion rate for TOC is three pounds of TOC is equal to one pound of BOD (3:1). The conversion rate for COD is eight pounds of COD is equal to one pound of BOD (8:1).

(5) Fee rate schedule. Except as provided in paragraph (6) of this subsection, the fee shall be determined as the sum of the following factors:

(A) contaminated flow, an amount up to a maximum of $1,090 [~~$700~~] per million gallons per day (mgd);

(B) uncontaminated flow, an amount up to a maximum of $18 [~~$10~~] per mgd;

(C) traditional pollutants, an amount up to a maximum of $23 [~~$15~~] per pound per day;

(D) toxic rating for industrial discharges:

(i) Group I, an amount up to a maximum of $310 [~~$200~~];

(ii) Group II, an amount up to a maximum of $1,090 [~~$700~~];

(iii) Group III, an amount up to a maximum of $1,640 [~~$1,050~~];

(iv) Group IV, an amount up to a maximum of $2,460 [~~$1,575~~];

(v) Group V, an amount up to a maximum of $4,910 [~~$3,150~~]; and

(vi) Group VI, an amount up to a maximum of $9,830 [~~$6,300~~];

(E) major permit designation, an amount up to a maximum of $3,120 [~~$2,000~~]; and

(F) storm water authorization, an amount up to a maximum of $780 [~~$500~~].

(6) For the types of permits listed in this paragraph, these additional guidelines will apply in determining the fee assessment.

(A) Land application (retention) permits. The fee assessed a land application permit shall be 50% of that calculated under paragraph (5) of this subsection. However, in no event shall the fee for an active land application permit be less than $1,250 [~~$800~~] per year.

(B) Inactive permits. The fee assessed an inactive permit shall be 50% of that calculated under paragraph (5) of this subsection. In the event an inactive permit is for a land application operation, the fee assessed shall be 25% of that calculated under paragraph (5) of this subsection. However, in no event shall the fee for an inactive permit be less than $620 [~~$400~~] per year.

(C) Storm water only permits. The fee for an active permit which authorizes discharge of storm water only, with no other wastewater, is an amount up to a maximum of $780 [~~$500~~].

(D) Aquaculture permits.

(i) In determining the flow volume to be used in fee calculation for an aquaculture production facility under paragraph (5) of this subsection, the flow for the facility shall be the facility's permitted annual average flow, or the facility's projected annual average flow if the permit does not have an annual average flow limitation.

(ii) If the facility's permit does not have an annual average flow limitation, the facility's projected annual average flow for the upcoming period from September 1 to August 31 shall be submitted to the executive director by June 30 preceding the fee year and shall be signed and certified as required by §305.44 of this title (relating to Signatories to Applications), and that amount will be used for fee calculation.

(iii) The annual fee for aquaculture production facilities is the amount, if any, set forth in TWC, Chapter 26 [~~shall not exceed $5,000~~].

(7) A multiplier may be applied to adjust the total fee per permit, which would also adjust the total assessment for all permits under the Water Quality Fee Program. The multiplier will be an amount up to a maximum of 1.75. As part of the approval of the annual operating budget, the executive director shall report to the commission the multiplier that will be applied for the upcoming fiscal year. [~~At the time of initial implementation, the multiplier is set at 1.0, with no impact on the fees.~~]

(c) Assessment for water rights.

(1) An annual fee is assessed against each person holding a water right, except for those exemptions specified in this section. A separate fee is assessed for each water right. These fees do not apply to water uses, including domestic and livestock use, which are exempt from the need for authorization from the commission under TWC, Chapter 11.

(2) This fee will apply to all municipal or industrial water rights, or portions thereof, not directly associated with a facility or operation which is assessed a fee under subsection (b) of this section, and to all other types of water rights except agriculture water rights and certain hydroelectric water rights described in paragraph (5) [~~(6)~~] of this subsection.

(3) The fee for each water right authorizing diversion of more than 250 acre-feet per year for consumptive use shall be $.385 [~~$.22~~] per acre-foot [~~up to 20,000 acre-feet, and $.08 per acre-foot thereafter~~].

(4) An authorization to impound water will be assessed a fee only when there is no associated consumptive use authorized, and then the fee will be calculated at the nonconsumptive rate described in paragraph (5) of this subsection.

(5) The fee for water rights for non-consumptive use, including hydropower purposes, shall be $.021 per acre-foot. The fee shall not be assessed against a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts.

[~~(5) Except for water rights for hydropower purposes, the fee shall be $.021 per acre-foot for water rights for non-consumptive use above 2,500 acre-feet per year, up to 50,000 acre-feet, and $.0007 per acre-foot thereafter.~~]

[~~(6) The fee for water rights for hydropower purposes shall be $.04 per acre-foot per year up to 100,000 acre-feet, and $.004 per acre-foot thereafter. This fee shall not be assessed against a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts.~~]

(6) [~~(7)~~] Water which is authorized in a water right for consumptive use, but which is designated by a provision in the water right as unavailable for use, may be exempted from the assessment of a fee under paragraph (3) of this subsection.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2009.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 239-6087

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CHAPTER 290. PUBLIC DRINKING WATER
SUBCHAPTER E. FEES FOR PUBLIC WATER SYSTEMS

30 TAC §290.51

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §290.51.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Water Resource Management Account 153 (Account 153) is the primary source of state funding for essentially all water program related activities of the commission. In 2001, the 77th Legislature passed House Bill 2912 which provided that revenues deposited to Account 153 would be available to the Legislature and the TCEQ to support activities associated with ensuring the protection of the state's water resources. Account 153 supports a wide range of activities associated with water rights, storm water, public drinking water, Total Maximum Daily Load development, water utilities, dam safety, wastewater, river compacts, water availability modeling, water assessment, Confined Animal Feeding Operations, sludge, Clean Rivers Program, and ground water protection. Historically, the agency has used Account 153 as well as the majority of its general revenue appropriations to support its water program activities.

General revenue appropriations to the commission have declined from the $51 million received in the 2004 - 2005 biennium. In addition, many of the water-related fees that the agency does assess have not increased in seven to ten years. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. As a result, the fund balance is close to being depleted. The current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to cover the costs of its water program activities in fiscal year (FY) 2010 - 2011.

Given the declining availability of funds in Account 153, the commission reviewed those water-related fees it has the authority to change. After a review of the commission's existing water related fees, the commission is proposing revisions to the consolidated water quality (CWQ) fee, the public health service (PHS) fee, and the water use assessment fee (WUF) to generate sufficient revenue to cover the costs of its water program activities beginning in FY 2010. These fees were identified for a fee increase because, in terms of numbers and categories of fee payers, they represent some of the most broad-based water related fees the agency assesses, revision of these three fees does not require statutory changes, and their revenue stream represents significant water fee collections.

With the depletion of fund balances in Account 153, the commission is proposing changes to ensure that funds to support water program activities will be available in FY 2010. Proposing this change at this time is intended to provide ample notification to potentially affected fee payers to prepare for changes in FY 2010 billings.

This proposal would amend Chapter 290, Public Drinking Water, to ensure that there are sufficient funds in FY 2010 to carry out the tasks required to protect the water resources of the state. In a corresponding rulemaking published in this issue of the *Texas Register*, the commission proposes to amend 30 TAC Chapter 21, Water Quality Fees. It is anticipated that to the extent affected fee payers need to increase rates to their customers through a tariff change, such change could be requested pursuant to 30 TAC §291.21(b)(2)(A)(iv), which authorizes the executive director to approve minor tariff changes in certain instances based on governmental requirements beyond the utility's control.

Within the scope of this proposal, this rulemaking may be adjusted in response to any action taken by the 81st Legislature affecting the commission's water fee structure and appropriations. The amount of general revenue appropriated to the agency to support water program activities could also likely affect the final assessment for both the CWQ and the PHS fee assessments, but will not affect the WUF fee included in this rule package.

SECTION DISCUSSION

The commission proposes to amend §290.51(a)(3) by increasing the fee amount in subparagraph (A) from $75 to $100 and in subparagraph (B) from $150 to $175. These increases were determined to be minimal for small systems with 160 connections or less. The commission also proposes to delete the formula, in subparagraph (C) which provides: "= $c^{0.70}$ X $7.40, where "c" is the number of connections," and in place of the formula provide that the fee will be an amount up to a maximum of $2.15 per connection. This change requires the same fee per connection for all systems with 161 connections and greater and will generate the necessary revenue to cover the cost of the TCEQ's water program activities. The commission also proposes to change the parameters regarding numbers of connections in subparagraph (B) from 25 - 99 to 25 - 160 and in subparagraph (C) from 100 connections to 161 connections. The commission proposes to amend §290.51(a)(5) by increasing the fee from $75 to $100. The assessment determined under §290.51(a)(3)(C) will be applied uniformly to all fee payers in this category and will be determined by the annual appropriations and other associated costs from Account 153. The commission proposes these changes to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities set by the state legislature.

The commission proposes to amend §290.51(a)(6) by updating the payment methods to include electronic funds transfer and the agency's payment portal. These options have been available since September 2004 and reflect current agency practice. Additionally, the commission proposes to change the name of the agency from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality."

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Chris Hayden, financial analyst with the Chief Financial Officer Division, determined that for the first five-year period the proposed rule is in effect, there will be fiscal implications for the agency with an increase in fee revenue of an estimated $15.3 million to Account 153. The proposed amendment is not expected to have significant fiscal implications for other state agencies. No significant fiscal implications are anticipated for units of local governments since any fee increases for facilities owned or operated by units of local government are anticipated to be passed on to their customers. The overall increase in fee revenue collected from units of local government is anticipated to be approximately $14.2 million annually in additional fees.

The proposed rule will increase revenue to Account 153. The current revenue from all assessments is approximately $4.3 million of which units of state and local government contribute $3.1 million. The proposed increase in fees is necessary to cover the costs of its water program activities. TCEQ is currently using existing fund balances from Account 153 to adequately fund its water programs required to protect the water resources of the state. Those balances are not being replenished.

Fee adjustments under the proposed rule

The calculations used in preparing this fiscal note were performed assuming the commission receives no general revenue for water program activities and using the maximum assessment amount of $2.15 per connection for a system with greater than 160 connections. For local governments with systems under 25 connections, the proposed fee rate will increase $25, from $75 to $100 per year. Currently, local government systems with between 25 and 99 connections pay $150 per year. The proposed rate for systems between 25 and 99 connections is $175 per year. Because of the changes to the tiers of connections, local governments with between 100 and 160 connections will go from using the formula derived per connection fee to a flat annual fee of $175. These systems will see a fee decrease that will vary from system to system and range from an $11 decrease per year to an $85 decrease per year. For local governments systems with 161 connections and greater, the proposed fee rate will be an amount up to a maximum of $2.15 per connection per year.

Statewide, the 30 systems with the largest increase under the proposed rule are all cities with over 37,000 connections. These 30 city-owned systems will account for $8.2 million of the overall increase. Under the proposed amendment all systems with 161 connections or more would pay an amount up to a maximum of $2.15 per connection per year or 18 cents a month per connection. Under the current rate structure for systems with more than 160 connections, as the number of connections increases, the fee per connection decreases. Under the proposed rule, all systems with 161 and greater connections would be assessed the same rate per connection.

For example, a city with over 1.1 million connections currently pays 11 cents per connection per year. Under the proposed rule this city would pay $2.15 per connection per year. If the maximum amount of $2.15 per connection was applied, this would represent an annual increase of $2.28 million above the current assessment. The maximum increase for a local government system with 2,000 or fewer connections under the proposed rule is less than $2,800 per year.

It is anticipated the units of local government will pass the increase on to the customer in the water utility bill and, therefore, the fee increases will not be a significant cost to units of state and local government.

The increase will be used to fund the water program activities of the state based on the appropriation levels set by the state legislature. The final fee rate assessment will be determined by the annual appropriations and other associated costs from Account 153.

PUBLIC BENEFITS AND COSTS

Mr. Hayden determined for each year of the first five years the proposed rule is in effect, the public benefit will be the continued protection of the state's water resources by adequate funding of the state's water programs. It is anticipated the systems will pass the increase on to the customer and, therefore, the proposed rule is not anticipated to have a significant fiscal impact on these water systems.

Fee adjustments under the proposed rule

All systems that currently pay PHS fees will be affected. The fee calculation will change and the amount of the fee is determined by the number of connections from the most recent field inspection report. The cost increase to the 4,500 water systems owned by businesses and individuals is projected to be $1,000,000 annually with an average increase of $225 in fees. These business and individual-owned systems will be subject to the same fee rate structure as those experienced by local governments. The cost per connection on an annual basis will range from a low of $4.17 to a high of $100 for systems under 25 connections; a low of $1.09 to a high of $7.00 for systems with total connections between 25 and 160; and, a flat $2.15 per connection for all systems with greater than 160 connections. These costs are all on an annual basis and are not significant.

The current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to cover the costs of activities in its water programs in FY 2010 - 2011. The increase will be used to fund the water program activities of the state in accordance with the appropriation levels set by the state legislature. The final fee assessment will be determined by the annual appropriations and other associated costs from Account 153.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impact to the estimated 3,500 small or micro-businesses which own water systems subject to the proposed rule. The proposed rule is anticipated to increase fees by approximately $265,000 per year with an average increase of $75 per year and the highest increase less than $1,000 per year. These increases are expected to be passed on to customers. These small business-owned systems will be subject to the same fee rate structures as those experienced by local governments and large businesses.

The increase will be used to fund the water program activities of the state based on the appropriation levels set by the state legislature. The final fee rate assessment will be determined by the annual appropriations and other associated costs from the Account 153.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed the proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect. Small or micro-businesses

are expected to recover any increased costs by passing any fee increases to their customers.

The increase will be used to fund the water program activities of the state in accordance with the appropriation levels set by the state legislature. The final fee rate assessment will be determined by the annual appropriations and other associated costs from the Account 153.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed the proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect the local economy in a material way for the first five years that the proposed rulemaking is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed rule is part of a larger proposed rulemaking to increase fees in order to provide funding for the commission's water program activities. The corresponding rulemaking, a proposed amendment to Chapter 21, Water Quality Fees, is published in this issue of the *Texas Register*. The proposed amendment to Chapter 290 does not meet the definition of "major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with the statutory requirements set forth in the Texas Water Code (TWC) and Texas Health and Safety Code. Therefore, the commission finds that this rulemaking is not a "major environmental rule."

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225 only applies to a state agency's adoption of a major environmental rule, the result of which it to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or, 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the proposed rulemaking does not exceed an express requirement of state law, but rather seeks to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with state law. Third, the proposed rulemaking does not exceed a requirement of a delegation agreement or a contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections which are cited in the STATUTORY AUTHORITY section of this preamble.

Based upon the foregoing, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invites public comment on the draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The commission determined that the proposed rulemaking does not constitute a taking. The specific purpose of the proposed rulemaking is to provide the commission with the additional revenue necessary to operate its water program activities in a manner that is consistent with the statutory requirements set forth in the TWC and Texas Health and Safety Code.

This rulemaking substantially advances this stated purpose by adjusting the factors by which the fees are calculated to provide funding at a level that is sufficient to support a portion of the commission's water program activities.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulation does not affect a landowner's rights in private real property because the rulemaking does not burden, restrict, or limit the owner's right to real property, and does not reduce the market value of real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. The proposed rulemaking will not burden private real property because it amends fee rules which relate to funding for the commission's water program activities.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on April 7, 2009, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2009-007-021-PR. The comment period closes April 13, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Kathleen Ramirez, Water Supply Division, (512) 239-6757.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, including water programs; §5.102, concerning general powers of the commission; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §5.701, which provides statutory direction regarding the uses of fees collected for deposit to the water resource management account; Texas Health and Safety Code (THSC), §341.0315, which establishes the commission's authority over public drinking water supply systems; and THSC, §341.041, which authorizes the commission to assess fees for public drinking water supply systems.

The proposed amendment implements THSC, §341.0315 and §341.041.

§290.51. Fees for Services to Drinking Water System.

(a) Purpose and scope.

(1) The purpose of this section is to establish fees for services provided by the commission to public water systems.

(2) The commission will provide services to public water systems, as follows:

(A) scheduling of analysis of drinking water for chemical content;

(B) collection of samples of drinking water for chemical analyses;

(C) review system data for evaluation of sampling waivers;

(D) inspect public water systems;

(E) review plans for new systems and major improvements to existing systems; and

(F) provide technical assistance as needed.

(3) The fees which the commission will charge for services provided to community and nontransient noncommunity water systems under this subsection will be according to the following schedule.

(A) For a system with fewer than 25 connections, the fee will be $100 [~~$75~~].

(B) For systems with 25 - 160 [~~99~~] connections, the fee will be $175 [~~$150~~].

(C) For a system with greater than or equal to 161 [~~100~~] connections, the fee will be an amount up to a maximum of $2.15 per connection [~~= c^0.70 X $7.40, where "c" is the number of connections~~].

(i) The number of connections will be determined from data collected from the latest agency inspection report.

(ii) All nontransient noncommunity systems, state, federal, and other community water system installations determined by the commission to serve large populations through a few connections will have the number of connections for fee purposes determined by dividing the population served by a value of ten.

(iii) Examples of such installations include, but are not limited to, universities, children's homes, correctional facilities, and military facilities which generally do not bill customers for water service.

(4) New public water systems will not be assessed a fee for services until water is supplied to the first connection.

(5) The commission will charge a fee of $100 [~~$75~~] for services provided to noncommunity water systems which are not addressed in paragraph (3) of this subsection.

(6) All fees are due by January 1 of each year, shall be paid by check, [~~or~~] money order, electronic funds transfer, or through the agency's payment portal, and shall be made payable to the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~]. Penalties and interest for the late payment of fees shall be assessed in accordance with Chapter 12 of this title (relating to Payment of Fees).

(b) Failure to make payments as required under this section will subject the violator to the penalty provisions of the Texas Health and Safety Code, Chapter 341, Subchapter C.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900900
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 239-6087

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 14. SCHOOL BUS SAFETY STANDARDS

SUBCHAPTER B. SCHOOL BUS DRIVER QUALIFICATIONS

37 TAC §14.14

The Texas Department of Public Safety proposes new Chapter 14, Subchapter B, §14.14, concerning Minimum Driving Record Qualifications. The new section sets forth minimum driving record requirements for drivers of school buses, school activity buses, and multifunction school activity buses. Elsewhere in this issue the Texas Department of Public Safety is simultaneously withdrawing the proposed new §14.14 published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9944).

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the new section is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new section as proposed. There is no anticipated economic costs to individuals who are required to comply with the new section as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the new section is in effect, the public benefit anticipated as a result of enforcing the new section will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to this new section. Accordingly, the Department is not required to complete a takings impact assessment regarding this new section.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.022, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.022 are affected by this proposal.

§14.14. Minimum Driving Record Qualifications.

(a) The following standards have been established by the department as minimum requirements to be met by each person seeking to become employed or to remain employed as a school bus driver to drive any motor vehicle while in use as a school bus for the transportation of students.

(b) Pre-employment Inquiries. Each employer shall make the following investigations and inquiries with respect to each school bus driver it employs:

(1) An applicant for employment as a school bus driver must disclose to the employer any violations of motor vehicle laws or ordinances (other than violations involving only parking) of which the applicant was convicted or forfeited bond or collateral during the three years preceding the date the application is submitted; any serious traffic violations, as defined in Texas Transportation Code, §522.003(25), of which the applicant was convicted during the ten years preceding the date the application is submitted; and any suspension, revocation, or cancellation of any driving privilege that the applicant has ever received.

(2) An inquiry into the school bus driver's complete driving record to the department and also to any other state(s) in which the school bus driver applicant held a motor vehicle operator's license or permit within the past seven years. If no previous driving record is found to exist, the employer must document their efforts to obtain such information, and certify that no previous driving record exists for that individual. The applicant's driving record shall be reviewed to determine whether that person meets minimum requirements as described in subsection (d) of this section.

(c) Annual inquiry and review of driving record.

(1) Each employer or designated person shall, at least once every twelve months, make an inquiry into the complete driving record of each school bus driver it employs to the department and also to any other state(s) in which the individual held a motor vehicle operator's license or permit during that time period.

(2) Each employer shall, at least once every twelve months review the driving record of each school bus driver it employs to determine whether that school bus driver meets minimum requirements as described in subsection (d) of this section.

(d) School Bus Driver's Driving Record Evaluation. In determining a person's eligibility to drive a school bus, any person who has accumulated ten or more penalty points shall be considered ineligible to transport students until such time as he/she may become qualified. The following standards shall apply in assessing penalty points for convictions of traffic law violations and crash involvements appearing on his/her current driving record:
Figure: 37 TAC §14.14(d)

(1) convictions for violations included in Table I shall be assessed one penalty point for each occurrence if the date of the violation is within three years of the date of the driving record evaluation;

(2) crash involvements included in Table II shall be assessed two penalty points if the date of occurrence is within three years of the date of the driving record evaluation. Persons disqualified because of penalty points assessed for crash involvement shall be notified of their right to a review;

(3) convictions for violations included in Table III shall be assessed three penalty points for each occurrence if the date of the violation is within three years of the date of the driving record evaluation;

(4) convictions for violations included in Table IV shall be assessed ten penalty points for each occurrence if the date of the violation is within ten years of the date of the driving record evaluation; and

(5) convictions for violations included in Table V shall be assessed ten penalty points for each occurrence if the date of the violation is within ten years of the date of the driving record evaluation.

(e) The assessment of penalty points is not required for any entry which does not appear in the alphabetized table listings. However, any entry which is deemed comparable to one appearing in these tables shall be assessed an equivalent number of penalty points.

(f) Appeal procedure for assessment of points due to crash involvement. Two points shall automatically be assessed for a crash involvement occurring within three years of the date of the driver record evaluation which appears on the driver history record. Applicants assessed two points for crash involvements appearing on their driving record may request a review by the person designated by the employer to determine if they were a cause of the crash(es). The applicant must identify the specific crash involvement(s) to be reviewed. Request a copy of the crash report(s) on the approved form. Mail the form to Crash Records, Texas Department of Transportation at the address listed on the form. The designated person shall review information pertinent to the crash(es), which should include the Texas Peace Officer's Crash Report. In examining this report, consideration of such items as Charges Filed, Investigator's Narrative of What Happened, Diagram, and Factors/Conditions Contributing to the Crash should assist in making a determination as to whether or not the assessment of penalty points is appropriate. If the designated person reviews the crash report and any other pertinent information and determines that the applicant was not a cause of the crash(es), no penalty points shall be assessed. If the designated person determines that the applicant was a cause of the crash(es), two penalty points shall be assessed for each crash. The decision of the employer is final.

(g) Disqualifications. A school bus driver who is disqualified shall not drive a school bus, school activity bus, or multifunction school activity bus. An employer shall not require or permit a driver who is disqualified to drive a school bus, school activity bus, or multifunction school activity bus.

(1) A school bus driver is disqualified for the duration of the driver's loss of his/her privilege to operate a motor vehicle either temporarily or permanently, by reason of the revocation, suspension, withdrawal, or denial of an operator's license, permit, or privilege until that operator's license, permit, or privilege is restored by the authority that revoked, suspended, withdrew, or denied it.

(2) A school bus driver who receives a notice that his/her license, permit, or privilege to operate a motor vehicle has been revoked, suspended, or withdrawn shall notify the employer that employs him/her of the contents of the notice before the end of the business day following the day the driver received it.

(h) Mandatory Disqualifying Offenses. A person shall be considered disqualified from operating a school bus, school activity bus, or multifunction school activity bus for the following:

(1) Within the 10-year period preceding the date of the check of the person's driving record for a conviction of the following offenses:

(A) Texas Penal Code, §49.04; or

(B) Texas Penal Code, §49.045; or

(C) Texas Penal Code, §49.07; or

(D) Texas Penal Code, §49.08.

(2) A suspension, disqualification, or prohibition order issued as a result of any alcohol-related or drug-related enforcement contact, as defined in the Texas Transportation Code, §524.001, during the ten years preceding the date of the check of the person's driving record.

(i) Credit for concurrent suspension arising from same drug or alcohol-related incident. If a criminal conviction occurs that arises out of the same arrest as the Administrative License Revocation suspension/disqualification, the disqualification period arising out of the same arrest shall not be longer than ten years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 26, 2009.

TRD-200900877
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 424-2135

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 809. CHILD CARE SERVICES
SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

40 TAC §809.94

The Texas Workforce Commission (Commission) proposes the following new section to Chapter 809, relating to Child Care Services:

Subchapter E. Requirements to Provide Child Care, §809.94

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The intent of the proposed changes to the Chapter 809 Child Care Services rules is to provide a mechanism by which the Commission and Local Workforce Development Boards (Boards) can ensure that child care providers receiving Commission child care funds are:

--meeting minimum health and safety standards as determined by the Texas Department of Family and Protective Services (DFPS); and

--providing the basic quality of care for children receiving Commission-funded child care.

The Commission rule changes are designed to balance two fundamental principles of the Child Care and Development Fund (CCDF):

--providing for the health and safety of children receiving subsidized child care; and

--ensuring that parents can choose from the full range of child care options to best suit their family needs.

Additionally, the Commission rules work in concert with the DFPS process for placing child care providers on corrective or adverse action. The Commission rules are based on DFPS regulatory remedies for child care providers that are found to be in noncompliance with health and safety standards and are designed to provide appropriate actions for Boards and parents, given the level of risk to children as determined by DFPS. The rules also balance parental choice and the health and safety of children with child care providers' due process for remedying regulatory deficiencies determined by DFPS.

Levels of Corrective and Adverse Action by DFPS

The Commission rules are predicated on the following three levels of actions that DFPS can take when a child care provider is found to be in noncompliance with state regulatory standards:

1. Evaluation Corrective Action

2. Probation Corrective Action

3. Adverse Action

According to the DFPS licensing rules at 40 TAC, Chapter 745, DFPS may impose an evaluation corrective action (evaluation status) when a provider's deficiencies present a lower risk to children and, as long as the conditions imposed by the evaluation are followed, the provider does not need to cease operating to make the corrections. Evaluation status:

--involves a period of heightened monitoring;

--is imposed only after a plan for compliance has been developed and when a specific incident or pattern of deficiencies is not serious enough to require probation; and

--cannot be imposed for less than 30 days or for more than six months.

For providers placed on evaluation status, the Commission rules require Boards to ensure that parents with children enrolled, or parents wishing to enroll children, in Commission-funded child care with the provider are notified in writing of the provider's evaluation status with DFPS. A parent can choose to continue the enrollment with the provider if the parent signs an acknowledgment affirming that he or she has been notified of the provider's evaluation status and has chosen to continue the enrollment.

According to Chapter 745 of the DFPS rules, DFPS may impose a probation corrective action (probationary status) when a specific incident or a pattern of deficiencies can lead to adverse action. Probationary status:

--is appropriate where a risk to children may exist but when further action, such as closing the provider, is not necessary as long as the deficiencies are addressed through the corrective action plan; and

--cannot be imposed for less than 30 days or for more than one year.

Additionally, Chapter 745 of the DFPS rules requires providers placed on evaluation or probationary status to post the corrective action notice in a prominent place near each public entrance.

For providers placed on probationary status, the Commission rules require Boards to ensure that parents with children enrolled in Commission-funded child care with the provider are notified in writing of the provider's probationary status. A parent can choose to continue the enrollment with the provider if the parent signs an acknowledgment affirming that he or she has been notified of the provider's probationary status and has chosen to continue the enrollment. However, the Board must ensure that no new enrollments of children receiving Commission-funded child care are accepted with a provider in probationary status.

According to Chapter 745 of the DFPS rules, an adverse action is applied when DFPS attempts to close a provider. Adverse action is taken when DFPS determines that the provider has deficiencies that endanger the health and safety of children. DFPS adverse actions include notifying the provider of DFPS' intent to deny, revoke, or suspend the provider's permit. If an adverse action is taken, the provider has a right to request an administrative review and a hearing. If the adverse action is upheld, the provider must close. Chapter 745 of the DFPS rules also requires that when a provider receives notice from DFPS that it intends to take adverse action against the provider, the provider must post the notice of the adverse action in a prominent place near each public entrance. The provider must also notify each parent, guardian, or managing conservator of the children enrolled within five days of receiving the notice from DFPS.

The Commission rules do not allow reimbursements for Commission-funded child care to any provider against which DFPS is taking adverse action. Therefore, Boards must ensure that:

--no new referrals are made to the providers; and

--children currently enrolled in Commission-funded child care with such providers are transferred to another eligible provider.

Chapter 745 of the DFPS rules provides that if, during an inspection, DFPS licensing staff discovers conditions that pose a threat of immediate danger to the children, DFPS licensing staff can take immediate actions to remove the children and initiate an emergency suspension and closure order. When this happens, DFPS policies require the provider to notify parents to pick up their children within four hours or by the end of the day, whichever is longer. The operation is then closed for no more than 10 days. Further, DFPS must initiate an adverse action in the form of an intent to revoke no later than five days from the date of the emergency closure. Although the provider may request an administrative review of the emergency closure and adverse action, the provider cannot operate or care for children during the administrative review.

Because the emergency suspension and closure order requires all children at the facility to be removed from care, the Commission believes it is not necessary to address provider eligibility for reimbursement in Commission rules as the provider is not entitled to any reimbursement while children are not allowed in care. Furthermore, the emergency nature of the closure, the short time frame for parental notification, and the requirement for immediate removal of children make additional parental notification an unnecessary burden upon the Board.

However, issuance of an emergency suspension and closure order may not mean that a provider has ceased operating. Under Chapter 745 of DFPS rules, a provider may seek a court injunction to stop the emergency suspension and closure if the provider disagrees with the DFPS determination that the provider poses an immediate threat to children. The court may decide to uphold the decision to close the operation. On the other hand, the court may enjoin closure and allow the provider to continue operating

pending the outcome of the administrative review of the adverse action.

Under DFPS rules, emergency closure actions are treated as adverse actions. Consistent with this approach, the Commission rules require Boards to treat a provider that, by a court order, is continuing operations pending the outcome of the administrative review, in accordance with the procedures for adverse actions.

Parent Choice

CCDF regulations at 45 C.F.R. §98.30 require states to allow parents to choose from a variety of child care categories including care in child care centers, group homes, and family homes, and care in the child's home. States cannot promulgate rules that significantly restrict parental choice in categories of care or that have the effect of excluding categories of care. Although the rules may affect a parent's choice of a particular individual provider under certain circumstances (specifically, providers placed on probationary status or adverse action), the rules neither restrict parents' choice of a particular provider category nor have the effect of excluding a substantial number of providers in any category.

According to DFPS data, the number of licensed and registered child care providers in State Fiscal Year 2008 (SFY'08) (September 1, 2007, through August 31, 2008) totaled 19,995. Also during SYF'08, 320 child care providers were placed on corrective or adverse action. Of those, 211 were placed on corrective action (113 on evaluation status and 98 on probationary status), and 109 were placed on adverse action. Therefore, the providers affected by these rules represent approximately 1.6 percent of all providers. DFPS data also shows that approximately 2.3 percent of licensed child care centers, 1.3 percent of licensed homes, and 0.8 percent of registered homes were placed on some type of corrective or adverse action.

The rules do not limit parent choice of the full range of provider categories in any specific local workforce development area (workforce area). Harris County had 86 providers on corrective or adverse action, followed by Bexar County with 22 providers. Only 5 other counties in Texas had more than 10 providers on corrective or adverse action. These providers represent less than 1 percent of the providers in a particular workforce area. Finally, of the 320 providers on corrective or adverse action during SFY'08, only 184 served children receiving Commission-funded child care. During that same period, 9,023 regulated providers cared for children receiving Commission-funded child care. Therefore, only 2 percent of regulated providers serving children in Commission-funded child care were placed on any type of corrective or adverse action.

Based on this data, the Commission concludes that these rules will not significantly limit parent choice of any provider category. Additionally, the rules allow a parent to enroll a child with a provider that is on evaluation status and allow a parent with a child currently enrolled with a provider on evaluation status to continue enrollment (provided the parent signs a statement acknowledging that the parent is aware of the provider's status with DFPS).

However, providers against whom DFPS is taking adverse action have been found by DFPS to have deficiencies that pose a risk to children. The Commission believes it is necessary to ensure the health and safety of children receiving publically subsidized child care, therefore the rules do not allow parents of children enrolled in Commission-funded child care the choice of a provider on adverse action.

Administrative Review Process through DFPS

The Commission emphasizes that Boards must allow a provider on corrective or adverse action to pursue DFPS' administrative review prior to the Board taking action to notify the parents, close enrollment, or transfer children. DFPS rules, Chapter 745, give providers 15 days from the initial notification of corrective or adverse action to request an administrative review. However, providers may request a waiver of an administrative review within that 15-day period. DFPS provides official notice to the provider following the administrative review or after receiving the request from the provider to waive the administrative review.

To assist in the implementation of these rules, DFPS has agreed to provide the Agency with an official notification when providers are placed on corrective or adverse action. Upon receiving notification from DFPS, the Agency will notify the affected Board. The Commission will provide further guidance and procedures to Boards through the issuance of a Workforce Development (WD) Letter. The rule language specifies that Board actions are taken only after receiving notification from the Agency of the provider's official status with DFPS.

The Commission also emphasizes the importance of allowing the DFPS administrative review to be completed prior to notifying the parents, closing enrollment, or transferring children to another provider. This allows providers to address any due process issues through DFPS. The administrative review is conducted under DFPS standard rules and procedures as set out in Chapter 745. The decision to place the provider on corrective or adverse action rests solely with DFPS and includes the DFPS' administrative review process. Therefore, the provider cannot appeal this decision to the Board. Further, the provider has no appeal rights to the Agency under Chapter 823, the Commission's Integrated Complaints, Hearings, and Appeals rules.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

The Commission proposes the following new section to Subchapter E:

§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department of Family and Protective Services

New §809.94 sets forth actions Boards must take when a provider is placed on corrective or adverse action by DFPS.

Section 809.94(a) describes Board requirements regarding providers placed on evaluation corrective action (evaluation status).

Section 809.94(a)(1) requires Boards to ensure that parents with children currently enrolled in Commission-funded child care with the provider are notified in writing of the provider's evaluation status. The Board must ensure that parents are notified no later than five business days from receipt of the Agency's notification of the DFPS decision to place the provider on evaluation status.

Section 809.94(a)(2) requires Boards to ensure that parents choosing to enroll a child in Commission-funded child care with a provider on evaluation status are notified of the provider's status with DFPS prior to enrolling the child.

Section 809.94(b) describes Board requirements regarding providers placed on probation corrective action (probationary status).

Section 809.94(b)(1) requires Boards to ensure that parents with children currently enrolled in Commission-funded child care with the provider are notified in writing of the provider's probationary status. These requirements mirror those in §800.94(a)(1) for children enrolled with a provider on evaluation status. The Board must ensure that parents are notified no later than five business days from receipt of the Agency's notification of DFPS' decision to place the provider on probationary status. If a parent decides to continue enrollment with a provider on corrective action (i.e., evaluation or probationary status), the parent must sign a written acknowledgment that he or she has been notified of the provider's status.

The Commission allows parents with children currently enrolled in Commission-funded child care with a provider on evaluation or probationary status to continue this enrollment in order to preserve parent choice and avoid any disruption of child care. The Commission recognizes that the current placement may best meet the needs of the working parent--requiring parents to transfer to another provider may place an undue burden on the parents and jeopardize their work arrangements.

Section 809.94(b)(2) requires that Boards must ensure that no new referrals are made to providers on probationary status. DFPS' decision to place a provider on probationary status involves findings that present a higher risk to children, thus it is essential that no new enrollments of children receiving Commission-funded child care occur until the provider corrects the deficiencies and is removed from probationary status by DFPS. The intent of this requirement is to ensure that the provider is aware of the importance of correcting any deficiencies as well as to ensure that children are initially placed with providers that meet minimum health and safety requirements.

Section 809.94(c) allows parent choice when a parent wants a child to be enrolled or continued to be enrolled with a provider on DFPS corrective action. A parent receiving the notification of the provider's status with DFPS, but who chooses to continue enrollment with the provider must sign an acknowledgment indicating that he or she is aware of the provider's status with DFPS, but has chosen to continue with the enrollment. The parent must return the acknowledgment to the Board's child care contractor within 10 days of receiving the notification.

The Commission believes that a parent should be informed and acknowledge in a signed document that enrollment with the provider is the parent's choice. Although this will not necessarily prevent future litigation by the parent, requiring a parent to affirmatively acknowledge his or her decision is consistent with the principle of parental choice and establishes informed consent should something happen to the child while in the provider's care.

Section 809.94(d) prohibits providers on any corrective action from receiving enhanced reimbursement rates under §809.20. Specifically, providers who are Texas Rising Star (TRS) certified, participating in Texas Early Education Model (TEEM), or Texas School Ready!™ certified are prohibited from receiving enhanced reimbursement rates while on DFPS evaluation or probationary status. The providers will remain eligible to receive the Board's regular reimbursement rate, but will not be eligible for the enhanced rate. It is the Commission's intent that providers receiving enhanced reimbursement rates are being compensated for attaining higher quality of early care and education. Therefore, if DFPS has placed a provider on corrective or adverse action, then the provider is not offering a higher quality of early care and education.

Section 809.94(e) sets forth Board requirements regarding providers against whom DFPS is taking adverse action.

Section 809.94(e)(1) requires that Boards notify parents with children enrolled in Commission-funded child care no later than two business days after receiving notification from the Agency that DFPS is taking adverse action against the provider. The Commission includes a maximum two-day notification requirement to emphasize the importance of timely notification when a provider is on adverse action. Because adverse action is taken when DFPS determines that conditions at the provider pose a risk to the health and safety of the children, it is important to notify parents of children receiving Commission-funded child care as quickly as possible. In order to speed the notification process, the Commission also notes that the notification does not have to be in writing, but may be a notification by phone or other means. The Board may provide written notification as long as the notification is provided to the parent no later than two days from receiving notification from the Agency.

Section 809.94(e)(2) requires Boards to ensure that children enrolled in Commission-funded child care with the provider are removed from care at that provider no later than five business days after receiving notification from the Agency that DFPS is taking adverse action against the provider. Although it is important to stress the timely nature of ensuring parental notification, it is also important to provide the parent with sufficient time and opportunity to locate and choose another eligible provider that meets the child care needs of the parent.

Section 809.94(e)(3) requires Boards to ensure that no new referrals for Commission-funded child care are made to the provider while DFPS is taking adverse action.

Finally, §809.94(f) sets forth the provisions applicable to a provider for which DFPS has determined that the provider poses an immediate risk to the health or safety of children and cannot operate pending appeal of the adverse action, but for which there is a valid court order that overturns DFPS' determination and allows the provider to operate pending administrative review or appeal. Commission rules state that in this situation, Boards must take action consistent with the provisions of §809.94(e). The Board must treat this situation in the same manner as a provider against whom DFPS intends to take adverse action. Specifically, the Board must notify parents no later than two business days after receiving notification from the Agency that the provider is on adverse action with DFPS and ensure that enrolled children in Commission-funded child care are removed from that provider's care no later than five business days after receiving notification from the Agency that the provider is on adverse action with DFPS.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and local governments expected as a result of enforcing or administering the rules.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

Economic Impact Statement and Regulatory Flexibility Analysis

The proposed rules will not have an adverse economic impact on small businesses. There would be minor administrative costs to notify parents and obtain and record parental acknowledgments in such cases. The rules may have estimated economic costs to some required to comply, including Boards and child care providers placed on corrective or adverse action by DFPS, but these would not be significant. Program staff has estimated that the number of facilities potentially impacted by these rules would total 1.6 percent of the total number of child care facilities in the state; this would create an impact and cost that would not be significant.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Laurence M. Jones, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to ensure that child care providers receiving Commission child care funds are meeting minimum health and safety standards as determined by DFPS and are providing the basic quality of care for children enrolled in Commission-funded child care.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas' 28 Boards. The Commission provided the concept paper regarding these rule amendments to the Boards for consideration and review on October 28, 2008. The Commission also conducted a conference call with Board executive directors and Board staff on October 31, 2008, to discuss the concept paper. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department of Family and Protective Services.

(a) For a provider placed on evaluation corrective action (evaluation status) by DFPS, Boards shall ensure that:

(1) parents with children enrolled in Commission-funded child care are notified in writing of the provider's evaluation status no later than five business days after receiving notification from the Agency of DFPS' decision to place the provider on evaluation status; and

(2) parents choosing to enroll children in Commission-funded child care with the provider are notified in writing of the provider's evaluation status prior to enrolling the children with the provider.

(b) For a provider placed on probation corrective action (probationary status) by DFPS, Boards shall ensure that:

(1) parents with children in Commission-funded child care are notified in writing of the provider's probationary status no later than five business days after receiving notification from the Agency of DFPS' decision to place the provider on probationary status; and

(2) no new referrals are made to the provider while on probationary status.

(c) A parent receiving notification of a provider's evaluation or probationary status with DFPS pursuant to subsections (a) and (b) of this section may choose to continue the enrollment of a child with the provider if the parent signs and returns to the Board's child care contractor within 10 business days of receiving such notification a written acknowledgment that the parent is aware of the provider's status with DFPS, but chooses to enroll the child with the provider.

(d) For a provider placed on evaluation or probationary status by DFPS, Boards shall ensure that the provider is not reimbursed at the Boards' enhanced reimbursement rates described in §809.20 while on evaluation or probationary status.

(e) For a provider against whom DFPS is taking adverse action, Boards shall ensure that:

(1) parents with children enrolled in Commission-funded child care are notified no later than two business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider;

(2) children enrolled in Commission-funded child care with the provider are transferred to another eligible provider no later than five business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider; and

(3) no new referrals for Commission-funded child care are made to the provider while DFPS is taking adverse action.

(f) For adverse actions in which DFPS has determined that the provider poses an immediate risk to the health or safety of children and cannot operate pending appeal of the adverse action, but for which there is a valid court order that overturns DFPS' determination and allows the provider to operate pending administrative review or appeal, Boards shall take action consistent with subsection (e) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2009.

TRD-200900822
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
Earliest possible date of adoption: April 12, 2009
For further information, please call: (512) 475-0829

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

16 TAC §309.3

Proposed amended §309.3, published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6685), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on February 25, 2009.

TRD-200900847

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TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 137. COMPLIANCE AND PROFESSIONALISM

SUBCHAPTER C. PROFESSIONAL CONDUCT AND ETHICS

22 TAC §137.63

The Texas Board of Professional Engineers withdraws the proposed amendment to §137.63 which appeared in the January 16, 2009, issue of the *Texas Register* (34 TexReg 320).

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900895
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: February 27, 2009
For further information, please call: (512) 440-7723

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 14. SCHOOL BUS SAFETY STANDARDS

SUBCHAPTER B. SCHOOL BUS DRIVER QUALIFICATIONS

37 TAC §14.14

The Texas Department of Public Safety withdraws the proposed new §14.14 which appeared in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9944).

Filed with the Office of the Secretary of State on February 26, 2009.

TRD-200900878
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: February 26, 2009
For further information, please call: (512) 424-2135

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

The Office of Rural Community Affairs (Office) adopts the amendments to §§255.1, 255.2, 255.4, 255.5, 255.8, 255.9, 255.11 and 255.17, and the repeal of §§255.3, 255.10, and 255.12 - 255.16, concerning the Texas Community Development Program, without changes to the proposal as published in the January 9, 2009, issue of the *Texas Register* (34 TexReg 131).

The adopted rules specify criteria contained within the 2009 Action Plan.

No comments were received regarding the adoption of the amendments or repeal.

10 TAC §§255.1, 255.2, 255.4, 255.5, 255.8, 255.9, 255.11, 255.17

The amendments are adopted under §487.052 of the Texas Government Code, which provides the board with the authority to adopt rules concerning the implementation of the Office's responsibilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2009.

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Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Effective date: March 16, 2009
Proposal publication date: January 9, 2009
For further information, please call: (512) 936-7887

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10 TAC §§255.3, 255.10, 255.12 - 255.16

The repeal is adopted under §487.052 of the Texas Government Code, which provides the board with the authority to adopt rules concerning the implementation of the Office's responsibilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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10 TAC §255.7

The Office of Rural Community Affairs adopts amendments to §255.7, concerning the Texas Capital Fund, with changes to the proposal published in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9164).

The amendments are adopted to allow for the equitable allocation of CDBG non-entitlement area funds to eligible units of general local government in Texas. More specifically, the amendment to §255.7(c) is made to allow the Texas Department of Agriculture (TDA) to accept untimely applications in certain circumstances when the delay was caused by extenuating circumstance that were unforeseeable by the applicant. This amendment will apply to the Texas Capital Fund grants, Main Street Program and Downtown Revitalization Program. The amendment to §255.7(h) requires Main Street Program applicants to only submit one application to the TDA to be evaluated by both the Texas Historical Commission (THC) and TDA. The amendment to §255.7(i), affecting the scoring of Main Street Program applications, is adopted with a change made to correct a grammatical error in the title of subsection (i)(2)(D), by taking out the word "and". The amendment to subsection (i) includes basing poverty information on the individual decennial Census data; broadening those agencies that will meet the criteria requiring a letter endorsing the project's effect on historical assets and preservation; lowering the threshold for the percentage of letters required from affected businesses; eliminating the requirement for an engineer to prepare a 5 year infrastructure report; diversifying point allocation for historic preservation activities by awarding points not only for having enacted an historic preservation ordinance, but also for having main street design guidelines and awarding points based on the percentage of businesses occupying the project area; eliminating the criteria based on nominations or activity with the Historic Preservation Commission. The amendment to §255.7(l), affecting the scoring of Downtown Revitalization Program applications, is adopted with a change in

the title of subsection (l)(2), made for purposes of consistency by changing "100" to "90". The maximum scoring criteria points for the downtown revitalization program was changed to 90, as indicated in the title to subsection (l), the reference to the maximum points in the title to subsection (l)(2) was inadvertently not changed to be consistent with the change in points. Another change was made to subsection (l). Subsection (l)(2)(K) has been deleted. The subparagraph was inadvertently included in the proposal and is duplicative of subsection (l)(2)(A) which provides for points for poverty level. The amendments to subsection (l) include reducing the total points attainable; eliminating the criteria based on unemployment statistics; basing poverty information on the individual decennial Census data; broadening those agencies that will meet the criteria requiring a letter endorsing the project's effect on historical assets and preservation; eliminating the criteria based on providing letters from 70% or more of the affected businesses; eliminating the criteria based on designation as a state or federal enterprise or defense zone; awarding points based on the percentage of businesses located in the project area.

No comments were received regarding adoption of the amendments.

The amendments to §255.7 are adopted under the Texas Government Code §487.052, which provides the Office of Rural Community Affairs with the authority to adopt rules and administrative procedures to carry out the provisions of Chapter 487 of the Texas Government Code.

§255.7. Texas Capital Fund.

(a) General Provisions. This fund covers projects which will result in either an increase in new, permanent employment within a community or retention of existing permanent employment. Under the main street improvements and downtown revitalization programs, projects must qualify to meet the national program objective of aiding in the prevention or elimination of slum or blighted areas.

(1) For an activity that creates/retains jobs, the city/county and business must document that at least 51% of the jobs are or will be held by low and moderate income persons. For purposes of determining whether a job is or will be held by a low or moderate income person or not, the following options are available.

(A) The business must survey all persons filling a created/retained job. Persons filling a created job should be surveyed at the time of employment. Persons holding a retained job should be surveyed prior to application submission. This determination is based on the family's size and previous 12 month income and is normally documented on the Family Income/Size Certification form, which is filled out, dated and signed by employees; or

(B) The person(s) employed by the business for created/retained jobs may be presumed to be a low or moderate income person if the person resides within a census tract or block numbering area that either is part of a Federally-designated Empowerment Zone or Enterprise Community or the person(s) reside in a census tract or block numbering area that meets the following criteria:

(i) The census tract or block numbering area has a poverty rate of at least 20% as determined by the most recently available decennial census information;

(ii) The census tract or block numbering area does not include any portion of a central business district, as this term is used in the most recent Census of Retail Trade, unless the tract has a poverty rate of at least 30% as determined by the most recently available decennial census information; and

(iii) The census tract or block numbering area shows evidence of pervasive poverty and general distress by meeting at least one of the following standards:

(I) All block groups in the census tract have poverty rates of at least 20%; or

(II) The specific activity being undertaken is located in a block group that has a poverty rate of at least 20%; or

(III) Has at least 70% of its residents who are low- and moderate-income persons; or

(IV) The assisted business is located within a census tract or block numbering area that meets the requirements of this subparagraph, and the job under consideration is to be located within that census tract or block numbering area.

(2) If the project is designed to aid in the prevention or elimination of slum or blighted areas, then it must meet the area slum or blight or spot slum or blight criteria and threshold requirements outlined in the separate main street or downtown revitalization program applications.

(3) A firm financial commitment from all funding sources.

(4) The leverage ratio between all funding sources to the Texas Capital Fund (TCF) request may not be less than 1:1 for awards of $750,000 or less; and 4:1 for awards of $750,000 to $1,000,000. The main street and downtown revitalization programs require a minimum 0.1:1 match.

(5) In order for an applicant to be eligible, the cost per job calculation must not exceed $25,000 for awards of $750,000 or less; and $10,000 for awards of $750,001 to $1,000,000. These requirements do not apply to the main street program or the downtown revitalization program.

(6) No financial assistance will be provided to projects involved in the relocation of any industrial or commercial plant, facility or operation, from one state to another state, if the relocation is likely to result in a significant loss of employment in the labor market area from which the relocation occurs. No assistance will be provided for projects intended to facilitate the relocation of any industrial or commercial plant, facility or operation from one unit of general local government within Texas to another unit of general local government within Texas unless a 10% net gain of jobs will occur and one of the following requirements has been met prior to submitting an application for consideration under this section:

(A) Business to relocate with approval of current locality. Local government must provide written documentation within the application, verifying the chief elected official (mayor or judge) of the unit of local government from which the business is relocating supports and approves the relocation proposal. A written agreement between the two local governments involved in the business relocation is preferred.

(B) Local government notification with no response. Local government must provide written documentation that a letter has been mailed (by registered mail) to the local government from which the business is relocating, notifying it of the relocation. The local government, upon receipt of the notification, then has 30 days to object to the relocation, in writing, to the TDA before the TCF application can be considered. A written objection to a relocation from a local government will prevent the application from being considered.

(7) The TDA will not consider any application for funding which will result in the provision of assistance for an economic development project where the applicant and one or more other cities

or counties are competing to provide economic development project funds to that project.

(8) The TDA will not consider any application for funding in which the business or principals to be assisted thereunder, or a business that shares common principals has filed under the Federal Bankruptcy Code, and the matter is in the process of being adjudicated or in which such business has been adjudicated bankrupt. On a case by case basis, extenuating circumstances will be evaluated.

(9) The TDA may consider applications in the real estate and infrastructure improvement programs that provide funding to benefit a maximum of three (3) businesses.

(10) The TDA will consider a project proposed by a city that is in the city's corporate limits or its extraterritorial jurisdiction, and will consider a project proposed by a county that is in the unincorporated area of the county. Counties may not sponsor an application for a business located in a city, if that business is currently participating in a TCF project with that city. TDA may consider providing funding for an economic development project proposed by a city that is outside the city's corporate limits or extraterritorial jurisdiction, but within the county or contiguous counties not to exceed five (5) miles beyond the city's extra-territorial jurisdiction that the city is located in and will consider a project proposed by a county that is within an incorporated city, if the applicant demonstrates that the project is appropriate to meet its needs, if the applicant has the legal authority to engage in such a project and if at least 51% of the principal beneficiaries reside within the applicant's jurisdiction.

(11) A TCF contractor must satisfactorily close out a contract in support of a specific business, downtown revitalization project, or main street project in order to be eligible to receive additional funds under the TCF for the same business, downtown project, or main street city. The contractor is eligible for an additional TCF award in support of a specific business, provided that the prerequisite program income choice has been selected, if the assisted business is not in the designated main street or downtown business district geographic area and the assisted business will create or retain jobs to meet the national program objective.

(12) The TDA will not consider or accept an application for funding from a community, in support of a business project that is currently receiving TCF assistance through that same community.

(13) The minimum and maximum award amount that may be requested/awarded for a project funded under the TCF infrastructure or real estate development programs, regardless of whether the application is submitted by a single applicant or jointly by two or more eligible jurisdictions is addressed here. Award amounts are directly related to the number of jobs to be created/retained and the level of matching funds in a project. Projects that will result in a significantly increased level of jobs created/retained and a significant increase in the matching capital expenditures may be eligible for a higher award amount, commonly referred to as jumbo awards. TCF monies are not specifically reserved for projects that could receive the increased maximum award amount, however, jumbo awards may not exceed $2 million in total awards during the program year. Additionally, no more than $1 million in jumbo awards will be approved in any round. The maximum amount for a jumbo award is $1 million and the minimum award amount is $750,100. The maximum amount for a normal award is $750,000 and the minimum award amount is $50,000. These amounts are the maximum funding levels. The program can fund only the actual, allowable, and reasonable costs of the proposed project, and may not exceed these amounts. All projects awarded under the TCF program are subject to final negotiation between TDA and the applicant regarding the final award amount, but at no time will the award exceed the amount originally requested in the application.

(14) TDA will allocate the available funds for the year, less $600,000 for the main street program, and $1,200,000 for the downtown revitalization program, as follows:

(A) First round. 30% of the annual allocation plus any deobligated and program income funds available, as of the application due date. In the event there are sufficient funds to fund 50% or more of an application request, but less than 100%, additional funds may be allocated to allow full or 100% funding.

(B) Second round. 40% of the remaining allocation plus any deobligated and program income funds available, as of the application due date. In the event there are sufficient funds to fund 50% or more of an application request, but less than 100%, additional funds may be allocated to allow full or 100% funding.

(C) Third round. 50% of the remaining allocation plus any deobligated and program income funds available, as of the application due date. In the event there are sufficient funds to fund 50% or more of an application request, but less than 100%, additional funds may be allocated to allow full or 100% funding. If only three application rounds are scheduled, all remaining funds will be allocated to the final round.

(D) Fourth round. Any remaining allocation plus any deobligated and program income funds available, as of the application due date.

(b) Overview. This fund is distributed to eligible units of general local government for eligible activities in the following program areas:

(1) The infrastructure program. The infrastructure program provides funds for eligible activities such as the construction or improvement of water/wastewater facilities, public roads, natural gas-line main, electric-power services, and railroad spurs.

(2) The real estate program. The real estate program provides funds to purchase, construct, or rehabilitate real estate that is wholly or partially owned by the community and leased to a specific benefiting business (either a for-profit entity or a non-profit entity).

(3) The main street program. The main street improvements program provides public improvements in support of Texas main street program designated municipalities.

(4) The downtown revitalization program. The downtown revitalization program provides public improvements to a city's historic main business district.

(c) Application Dates. The TCF (except for the main street program and the downtown revitalization program) is available up to four times during the year, on a competitive basis, to eligible applicants statewide. Applications for the main street program and the downtown revitalization program are accepted annually. Applications will not be accepted after 5:00 p.m. on the final day of submission, unless the applicant can demonstrate that the untimely submission was due to extenuating circumstances beyond the applicant's control. The application deadline dates are included in the program guidelines.

(d) Repayment Requirements. TCF awards for real estate improvements and private infrastructure require repayment. Infrastructure payments and real estate lease payments are intended to be paid by the benefiting business to the applicant/contractor and constitute program income. The repayment is structured as follows:

(1) Real estate improvements. These improvements are intended to be owned by the applicant and leased to the business. Real

estate improvements require full repayment. At a minimum, the lease agreement with the business must be for a minimum three year period or until the TCF contract between the applicant and TDA has been satisfactorily closed (whichever is longer). A minimum monthly lease payment will be required to be collected from the original business and any subsequent business which occupies the real estate funded by the TCF, which equates to the principal funded by the TCF divided over a maximum 20 year period (240 months), or until the entire principal has been recaptured. The repayment term is determined by TDA and may not be for the maximum of 20 years for smaller award amounts. There is no interest expense associated with an award. Payments begin the first day of the third month following the construction completion date or acquisition date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount. After the contract between the applicant and the Department is satisfactorily closed, the applicant will be responsible for continuing to collect the minimum lease payments only if a business (any business) occupies the real estate. The lease agreement may contain a purchase option, if the option is effective after a minimum five year ownership requirement and if the purchase price equals (at a minimum) the remaining principal amount originally funded by the TCF which has not been recaptured.

(2) Infrastructure improvements.

(A) Private Infrastructure is infrastructure that will be located on the business's site or on adjacent and/or contiguous property, to the site, that is owned by the business, principals, or related entities. All funds for private infrastructure improvements require full repayment. Terms for repayment will be interest free, with repayment not to exceed 20 years and are intended to be repaid by the business through a repayment agreement. Payments begin the first day of the third month following the construction completion date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount.

(B) Public Infrastructure is infrastructure located on public property or right-of-ways and easements granted by entities unrelated to the business or its owners and not included or identified as private infrastructure. All funds for public infrastructure do not require repayment.

(C) Rail improvements on private property require full repayment. Terms for repayment will be no interest, with repayment not to exceed 20 years and are intended to be repaid by the business through a repayment agreement. Payments begin the first day of the third month following the construction completion date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount.

(e) Application process for the infrastructure and real estate programs. The TDA will only accept applications during the months identified in the program guidelines. Applications are reviewed after they have been competitively scored. Staff makes recommendation for award to the TDA Commissioner. The TDA Commissioner makes the final decision. The application and selection procedures consist of the following steps:

(1) Each applicant must submit a complete application to TDA's Rural Economic Development Division. No changes to the application will be allowed after the application deadline date, unless they are a result of TDA staff recommendations. Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of applications, TDA staff reviews scores for validity and ranks them in descending order.

(3) TDA staff will review the applications for eligibility and completeness in descending order based on the scoring. The applicant will be given 10 business days to rectify all deficiencies. An application containing an excessive number of deficiencies, or deficiencies of a material nature will be determined incomplete and returned. In the event staff determines that an application contains activities that are ineligible for funding, the application will be restructured or returned to the applicant. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4) TDA staff then conducts a review of each complete application to make threshold determinations with respect to:

(A) The financial feasibility of the business to be assisted based on a credit analysis;

(B) The strength of commitments from all other public and/or private investments identified in the application;

(C) Whether the use of TCF is appropriate to carry out the project proposed in the application;

(D) Whether efforts have been made to maximize other financial resources;

(E) Whether there is evidence that the permanent jobs created or retained will primarily benefit low-and-moderate income persons; and

(F) The ability of the applicant to operate or maintain any public facility, improvements, or services funded with TxCDBG funds.

(5) Upon TDA staff determination that an application supports a feasible and eligible project, staff normally will schedule a visit to the applicant jurisdiction to discuss the project and program rules with the chief elected official (or designee), business representative(s), and to visit the project site.

(6) TDA staff prepares a project report with recommendations (for approval or denial) to TDA's Commissioner.

(7) The TDA Commissioner reviews the recommendation and announces the final decision.

(8) TDA staff works with the recipient to execute the contract agreement. While the contract award must be based on the information provided in the application, TDA staff may negotiate some elements of the final contract agreement with the recipient.

(9) The contract is drafted and then reviewed by management and legal prior to two copies being mailed to award recipient. Upon receipt, the award recipient has 30 days to review and execute both copies. Once returned to TDA, the contract will be fully executed by the TDA Commissioner and then a single copy is returned to contractor.

(f) Scoring criteria for the infrastructure and real estate programs. There is a minimum 25-point threshold requirement. Applications will be reviewed for feasibility in descending order based on the scoring criteria. There are a total of 100 points possible.

(1) In the event of a tie score and insufficient funds to approve all applications, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on the job impact. Thus, preference is given to the applicant with the greater job impact.

(B) If a tie still exists after applying the first criteria then applications are ranked from lowest to highest based on the number of jobs proposed to be created and/or retained in the application. Thus, preference is then given to the applicant with the greater number of jobs.

(2) Community Need (maximum 40 points). Measures the economic distress of the applicant community.

(A) Unemployment (maximum 5 points). Awarded if the applicant's quarterly county unemployment rate (the most recently available 3 months will be used) is higher than the state rate, indicating that the community is economically below the state average.

(B) Poverty (maximum 10 points). Awarded if the applicant's annual county poverty rate for individuals (from the 2000 Census) is higher than the annual state rate for individuals (from the 2000 Census), indicating that the community is economically below the state average. Applicants will score 5 points if their rate meets or exceeds the state average of 15.4%; and score 10 points if this figure exceeds the state average of 17.7%.

(C) Previous Contracts (Maximum 10 points). Award 5 points if the community has been awarded one contract in the current calendar year or preceding 2 calendar years. Award 10 points if the community has been awarded zero contracts in the current calendar year or the preceding 2 calendar years.

(D) Community Population/Size (maximum 10 points). Points are awarded to applying small cities and counties using 2000 Census data. For cities: score 5 points if the city is located in a county with a population of 35,000 or less; and score 5 additional points if the population of the city is less than 5,000. For counties: score 5 points if the county population is less than 35,000 and score 5 additional points if the county population is less than 15,000. Community population figures are net of the population held in adult or juvenile correctional institutions/facilities.

(E) Per Capita Income (maximum 5 points). Five points awarded to applicants that have a per capita income below $19,617.

(3) Jobs (maximum 35 points).

(A) Job Impact (maximum 15 points). Awarded by taking the business' total job commitment, created and retained, and dividing by applicant's 2000 unadjusted population. This equals the job impact ratio. Score 5 points if this figure exceeds .00485; score 10 points if this figure exceeds .00969; and score 15 points if this figure exceeds .01455. County applicants should deduct the 2000 census population amounts for all incorporated cities, except in the case where the county is sponsoring an application for a business that is or will be located in an incorporated city. In this case the city's population would be used, rather than the county's. Community population figures are net of the population held in adult or juvenile correctional institutions, as shown in the 2000 census data.

(B) Wage Impact (maximum 10 points). Awarded by taking the business' average weekly wage commitment, for all jobs proposed to be created and retained, and dividing by applicant's most recent county, quarterly, private sector average weekly wage. Score 5 points if this figure exceeds .50; score 10 points if this figure exceeds .60.

(C) Cost per Job (maximum 10 points). Awarded by dividing the amount of TCF monies requested (including administration) by the number of full-time job equivalents to be created and/or retained. Points are then awarded in accordance with the following scale:

(i) Below $15,000--10 points.

(ii) Below $20,000--5 points.

(4) Business/Economics Emphasis (maximum 25 points).

(A) Preferred/Primary jobs (maximum 20 points). Awarded if the jobs to be created and/or retained are or will be employed by a benefiting business whose primary North American Industrial Classification System (NAICS) code number falls into the categories identified in clauses (i) - (iii) of this subparagraph. This is based on the NAICS number reported on the business' Texas Workforce Commission (TWC) Quarterly Contribution Report, Form C-3, their IRS business tax return, or other documentation from the Texas Workforce Commission. Foreign or start-up businesses that have not had a NAICS code number assigned to them by either the TWC or IRS, may submit alternative documentation from TWC to support their primary business activity (NAICS code) to be eligible for these points.

(i) 20 points for the following NAICS category: 31-33 Manufacturing.

(ii) 15 points for the following NAICS category: 111 Crop Production; 112 Animal, Poultry, and Egg Production; 113 Forestry/Logging; 114 Commercial Fishing; 115 Support Activities for Agriculture; 211-213 Mining; 42 Wholesale Trading; 48-49 Transportation/Warehousing; 51 Information (excluding 512-theaters); 5182 Data Processing, Hosting, and Related Services; 62 Health Care.

(iii) 5 points for projects involving non-primary jobs, when the business offers a choice of medical prescription drug benefits to employees, including coverage for the family.

(B) Small/HUB businesses (maximum 5 Points). Awarded if each/the benefiting Business in a "multiple business" application employs less than 100 employees for all locations both in and out of state, or has been certified by the Comptroller of Public Accounts as a Historically Underutilized Business (HUB). This number is determined by the business and any related entities, such as parent companies, subsidiaries and common ownership. Common ownership is considered 51% or more of the same owners.

(g) Equity requirement by the business. All businesses are required to make financial contributions to the proposed project. A cash injection of a minimum of 2.5% of the total project cost is required. Total equity participation must be no less than 10% of the total project cost. This equity participation may be in the form of cash and/or net equity value in fixed assets utilized within the proposed project. A minimum of a 33% equity injection (of the total projects costs) in the form of cash and/or net equity value in fixed assets is required, if the business has been operating for less than three years and is accessing the R/E program. TDA staff will consider a business to have been operating for at least three years if:

(1) The business or principals have been operating for at least three years with comparable product lines or services;

(2) The parent company (100% ownership of the business) has been operating for at least three years with comparable product lines or services; or

(3) An individual or partnership (100% ownership of the business) has been in existence/operation for at least three years with comparable product lines or services.

(h) Application process for the main street program. The application and selection procedures consist of the following steps:

(1) Each applicant must submit one complete application to TDA. No changes to the application are allowed after the application deadline date, unless they are a result of TDA staff recommendations.

Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of the applications, staff from the Texas Historical Commission (THC) and TDA evaluate the applications based on the scoring criteria and ranks them in descending order.

(3) TDA staff will then review the four highest ranking applications for eligibility and completeness in descending order based on the scoring. In the event the staff determines the application contains activities that are ineligible for funding, the application will be restructured or considered ineligible. The applicant will be notified of any deficiencies and given 10 business days to rectify all deficiencies. An application containing an excessive number of deficiencies, or deficiencies of a material nature (e.g., lack of financial commitments) may be declined. In any event a determination is made that an application contains activities that are ineligible for funding, the application will be restructured or declined and the application materials will be retained by TDA. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4) TDA staff then conducts a review of each complete application to make threshold determinations with respect to:

(A) The project feasibility;

(B) The strength of commitments from all other public and/or private investments identified in the application;

(C) Whether the use of TCF is appropriate to carry out the project proposed in the application;

(D) Whether efforts have been made to maximize other financial resources; and

(E) The ability of the applicant to operate or maintain any public facility, improvements, or services funded with TCF funds.

(5) Upon TDA staff determination that an application supports a feasible and eligible project, an on-site visit to the four highest scoring applicants may be conducted by TDA staff to discuss the project and program rules with the chief elected official, as applicable, or their designee and to visit the Main Street area.

(6) TDA staff prepares a project report and makes a recommendation for approval or denial to TDA's Commissioner or the Commissioner's designee for the final decision.

(7) The Commissioner reviews the recommendation and, if approved, an award letter is sent to the applicant's chief elected official.

(8) The contract is drafted and then reviewed by management and legal prior to two copies being mailed to award recipient. Upon receipt, award recipient has 30 days to review and execute both copies. Once returned to TDA, the contract will be fully executed by the Commissioner or the Commissioner's designee and then a single copy is returned to contractor.

(i) Scoring criteria for the main street program. There is a minimum 25-point threshold requirement. Applications will be reviewed for feasibility and placed in descending order based on the scoring criteria. There is a total of 100 points possible.

(1) In the event of a tie score, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on the applicant's most recently available individual decennial Census poverty rate. Thus, preference is given to the applicant with the higher poverty rate.

(B) If a tie still exists after applying the first criteria, then applications are ranked from lowest to highest based on the most recently available, quarterly, county unemployment rate provided by the Texas Workforce Commission. Thus, preference is then given to the applicant with the higher unemployment rate.

(2) Project Feasibility (maximum 50 points). Measures the applicant's potential for a successful project. Each applicant must submit detailed and complete support documentation for each category. Compliance with the ten criteria for Main Street Recognition is required. First year Main Street Cities must receive prior approval from THC to apply and must submit the Main Street Criteria for Recognition Survey with the TCF application. The criteria include the following:

(A) Broad-based public support for the proposed project--(10 points). Show letters of support from the following:

(i) Score 5 points for providing a letter from the County Historic Preservation Commission, the local design review board, the Economic Development Corporation or Chamber of Commerce supporting the project and describing how the project enhances the community's historic assets and historic preservation goals.

(ii) Score 5 points for letters from 50% or more of the businesses and/or property owners impacted by the proposed project within the designated Main Street district. This specifically includes businesses within one (1) block of the proposed improvements.

(B) Infrastructure Project Plan--(10 points).

(i) Score 5 points for providing the city's plan for dealing with an infrastructure project, including a detailed description of how access will be provided to affected businesses during project construction.

(ii) Score 5 points for providing a general description of future infrastructure projects in the Main Street area, over the next five years, and the potential impact to the area.

(C) Sidewalks and ADA Compliance Goals--(10 points).

(i) 5 Points awarded if a minimum of 50% of the requested funds will be used for sidewalk and/or ADA compliance activities; and

(ii) 10 points awarded if a minimum of 70% of the requested funds will be used for sidewalk and ADA compliance activities.

(D) Historic Preservation Ethic Impact (10 points). Preservation is a major component of the THC's Main Street program.

(i) Award 5 points to applicants that have a current historic preservation ordinance.

(ii) Award 5 points to applicants that have design guidelines for the Main Street program or project area.

(E) Economic Development Consideration--(5 points). Five points will be awarded if the city has the economic development sales tax (4A, 4B or both).

(F) Main Street Program Participation--(5 points). Points are awarded on the applicant's continuous participation in the Main Street program as follows: For every two years of continuous participation in the Main Street program, the applicant will be awarded 1 point. Points will only be awarded for every two consecutive years and will not be broken into half points for increments other than two-year increments. If a city leaves the Main Street program and then returns at a later date, "continuous participation" will be calculated from the date that they returned to the program. Applicants will

receive the maximum amount of points if they have participated in the program for 10 continuous years.

(3) Applicant (maximum 50 points). There are six applicant scoring categories each worth 5 to 20 points.

(A) Minority Hiring (maximum 10 points). Measures applicant's hiring practices. Percentage of minorities presently employed by the applicant divided by the percentage of minority residents within the local community. Score 10 points if the applicant's minority employment rate is equal to or greater than the applicant's community minority rate.

(B) Leverage/Match (maximum 10 points). A 10% cash match is required for the grant. Additional points will be given for additional matching funds as follows: 10% additional match equals 5 points. 20% additional match equals 10 points. The additional match may be cash and/or in-kind.

(C) Main Street Standing (maximum 5 points). If the Main Street program received national Recognition the prior year, 5 points will be awarded.

(D) Community Size--(10 points). Award 5 points if the population of the city is 12,000 or less; score additional 5 points if the population is less than 4,000, using the most recent decennial census data. City population figures are net of the population held in adult or juvenile correctional institutions.

(E) Texas Capital Fund Grant Training--Score 5 points if a city official/employee has attended a TCF, Main Street Improvements and/or Downtown Revitalization application training workshop, within the previous two (2) years.

(F) Poverty Level (maximum 10 points). Award 5 points if the city's most recent decennial Census, individual poverty rate is equal to or greater than the state poverty rate or award 10 points if the city rate is 15% or more over the state rate.

(j) Threshold criteria for the main street program. In order for its application to be considered, an applicant must meet the requirements of either paragraph (1) or (2) and paragraph (3) of this subsection.

(1) The national objective of aiding in the prevention or elimination of slum or blight on a spot basis. To show how this objective will be met, the applicant must:

(A) document that the project qualifies as slum or blighted on a spot basis under local law; and

(B) describe the specific condition of blight or physical decay that is to be treated.

(2) Area slums/blight objective. Document the boundaries of the area designated as a slum or blighted, document the conditions which qualified it under the definition in §255.1(a)(14) of this title (relating to General Provisions), and the way in which the assisted activity addressed one or more of the conditions which qualified the area as slum or blighted.

(3) Main street designation. The applicant must be designated by the THC as a Main Street City prior to submitting a TCF application for main street improvements and must remain a participating city for the duration of the award/contract.

(k) Application process for the downtown revitalization program. The TDA will only accept applications during the months identified in the program guidelines. Applications are reviewed after they have been competitively scored. Staff makes recommendation for award to TDA Commissioner or the Commissioner's designee. TDA Commissioner makes the final decision. The application and selection procedures consist of the following steps:

(1) Each applicant must submit a complete application to TDA's Rural Economic Development Division. No changes to the application will be allowed after the application deadline date, unless they are a result of TDA staff recommendations. Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of applications, TDA staff reviews scores for validity and ranks them in descending order.

(3) TDA staff will review the applications for eligibility and completeness in descending order based on the scoring. The applicant will be given 10 business days to rectify all deficiencies. An application containing an excessive number of deficiencies, or deficiencies of a material nature will be determined incomplete and returned. In the event staff determines that an application contains activities that are ineligible for funding, the application will be restructured or returned to the applicant. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4) TDA staff then conducts a review of each complete application to make threshold determinations with respect to:

(A) The strength of commitments from all other public and/or private investments identified in the application;

(B) Whether the use of TCF is appropriate to carry out the project proposed in the application;

(C) Whether efforts have been made to maximize other financial resources; and

(D) The ability of the applicant to operate or maintain any public facility, improvements, or services funded with TCF funds.

(l) Scoring criteria for the downtown revitalization program. There are a total of 90 points.

(1) In the event of a tie score and insufficient funds to approve all applications, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on applicant's most recently available individual decennial Census poverty rate. Thus, preference is given to the applicant with the higher poverty rate.

(B) If a tie still exists after applying the first criteria then applications are ranked from lowest to highest based on the most recently available three (3) month county unemployment rate provided by the Texas Workforce Commission. Thus, preference is then given to the applicant with the higher unemployment rate.

(2) Maximum 90 points.

(A) Poverty (maximum 10 points). Awarded if the applicant's most recently available, decennial poverty rate for individuals is higher than the annual state rate for individuals, indicating that the community is economically below the state average. Applicants will score 5 points if their rate meets or exceeds the state average of 15.4% and score 10 points if this figure exceeds 17.7%.

(B) Economic Development Consideration--(5 points) awarded if the city has passed the economic development sales tax (4A, 4B or both).

(C) Previous Contracts (Maximum 10 points). Award 5 points if the community has been awarded one contract in the current

calendar year or preceding 2 calendar years. Award 10 points if the community has been awarded zero contracts in the current calendar year or the preceding 2 calendar years.

(D) Community Population (maximum 10 points). Points are awarded to applying cities with populations of 5,050 or less, using 2000 census data. Score 5 points if the city is located in a county with a population of 35,000 or less; and score 5 additional points if the population of the city is less than 5,050. Community population figures are net of the population held in adult or juvenile correctional institutions, as shown by the 2000 census data.

(E) Per Capita Income (maximum 10 points). Awarded to cities that have a per capita income below $19,617.

(F) Leverage/Match (maximum 10 points). A 10% cash match is required for the grant. Additional points will be given for additional matching funds. 10% additional match equals 5 points. 20% additional match equals 10 points. The additional match can be cash and/or in-kind.

(G) Award 5 points to applicants if 50% or more of the structures within the project area are occupied by businesses.

(H) Minority Hiring (maximum 10 points). Measures applicant's hiring practices. Award 5 points if the city's minority employment rate is equal to or greater than the community minority percentages rate. Award 10 points if the city's minority employment rate is equal to or greater than 125% of the community minority percentage rate or in cities where the minority population is 80% or greater, the applicant must employ 95% minorities.

(I) Broad-based public support for the proposed project--(10 points). Show letters of support from the following:

(i) Score 5 points for providing a letter from one of the following: the County Historic Preservation Commission, the local design review board, the Economic Development Corporation or Chamber of Commerce supporting the project and describing how the project enhances the community's historic assets and historic preservation goals.

(ii) Score 5 points for letters from 50% or more of the businesses and/or property owners impacted by the proposed project within the downtown business district. This specifically includes businesses within one (1) block of the proposed improvements.

(J) Sidewalks and ADA Compliance Goals--(10 points total). Five points awarded if a minimum of 50% of the requested funds will be used for sidewalk and/or ADA compliance activities; and 10 points awarded if a minimum of 70% of the requested funds will be used for sidewalk and/or ADA compliance activities.

(m) Threshold criteria for the downtown revitalization program. In order for its application to be considered, an applicant must meet the requirements of either paragraph (1) or (2) of this subsection.

(1) The national objective of aiding in the prevention or elimination of Slum or Blight on a spot basis. To show how this objective will be met, the applicant must:

(A) document that the project qualifies as slum or blighted on a spot basis under local law; and

(B) describe the specific condition of blight or physical decay that is to be treated.

(2) Area slums/blight objective. Document the boundaries of the area designated as a slum or blighted, document the conditions which qualified it under the definition in §255.1(a)(14) of this title, and the way in which the assisted activity addressed one or more of the conditions which qualified the area as slum or blighted.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 27, 2009.

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Office of Rural Community Affairs
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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

The Public Utility Commission of Texas (commission) adopts the repeal of §25.475, relating to Information Disclosures to Residential and Small Commercial Customers, a new §25.475, relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers, and an amendment to §25.476, relating to Renewable and Green Energy Verification. New §25.475 and the amendment to §25.476 are adopted with changes to the proposed text and the repeal of §25.475 is adopted without changes as published in the August 29, 2008, issue of the *Texas Register* (33 TexReg 7114). The rule will improve disclosures to customers for retail electric service by updating the requirements of the electricity facts label and terms of service documents and will clarify advertising and marketing responsibilities. The rules are competition rules subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). The rules are adopted under Project Number 35768.

A public hearing on the rules was held at commission offices on October 22, 2008, at 9:30 a.m. Representatives from the Alliance for Retail Markets (ARM); Reliant Energy, Inc. (Reliant); Texas Energy Association of Markets (TEAM), and TXU Energy (TXU) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received written comments from ARM; Ben Ray; Carol Guffey; Steering Committee of Cities Served by Oncor (Cities); ConocoPhilips Company (ConocoPhilips); Diane Berdes; CPL Retail Energy, LP; Direct Energy, LP and WTU Retail Energy (Direct Energy); Environmental Defense Fund (EDF); Energy Plus Company (EPC); First Choice Power (First Choice); Gateway Energy (Gateway); Gexa Energy

(Gexa); Green Mountain Energy (Green Mountain); Kenneth and Virginia Kyle; Milton Bird; Office of Public Utility Counsel (OPC); Public Utility Brokers; Reliant; State Representative Jim Jackson; State Representative John Zerwas; Robin Parr; Tara Energy (Tara); TEAM; Texas Ratepayers Organization to Save Energy and Texas Legal Services Center (Texas ROSE/TLSC); Texas Industrial Energy Consumers (TIEC); and TXU.

Comment Summary:

Question 1: What information should constitute sufficient evidence that a customer has relocated as contemplated in §25.475(c)(2)(D)?

ARM asserted that a customer's move to another premise during the contract term constitutes a termination of service and proposed that a Retail Electric Provider (REP) be permitted to assess an early termination fee for the termination of service resulting from a customer's relocation.

Alternatively, ARM stated if the commission concludes that a REP may not assess an early termination penalty when a customer relocates, the customer should be required to contact the REP in advance of the move date, provide the REP documentation of the forwarding address to which the REP can send the final bill, and reasonable evidence of the customer's relocation to avoid assessment of the fee. TEAM suggested that proof should be mirrored by that required of most public school districts which TEAM reported require a copy of the property tax assessment, an executed lease, deed of sale, and a driver's license with a matching address or a current utility bill with current matching address. TXU suggested evidence be some government document or operative legal document such as a lease or purchase closing statement with a date consistent with the move period.

Public Utility Brokers stated that including this customer protection for commercial customers exposes the REP to excessive risk and this provision should be allowed to be waived by the customer for a lower rate.

Texas ROSE/TLSC stated that customers move every day and that REPs currently have a process and part of that process is securing a forwarding address and they saw no reason why procedures should be established to govern a routine internal company transaction. OPC agreed and stated that REPs should continue their current practice of accepting evidence of a customer's relocation as it allows for flexibility on the part of both the customer and the REP and to the best of OPC's knowledge there have not been significant problems for either the REPs or customers regarding this issue.

Reliant, First Choice and Cities did not support the proposal to introduce an increased burden on customers to provide evidence that they have relocated. Cities stated that the policy basis for permitting a customer to terminate a contract for service to a location when a customer moves is sound because different premises often have different energy requirements, and customers have their own appetite for risk price sensitivity and other needs.

Reliant challenged the notion that a customer's contract period would end when the REP receives evidence that the customer no longer lives at the subject residence. A customer may move to a new residence but still own and want electricity provided to the old residence. Instead, the contract period should end when the customer is no longer responsible for electric service at the covered premise. ARM commented that Reliant's proposal should be rejected because the assessment of the penalty is not required and the customer may want to remain in the contract with the REP at its new premises. First Choice stated the REP should also have the option of allowing a customer to keep an existing contract when moving. ARM stated that the REP should have the ability to waive an early termination fee at its discretion if the customer moves to a new location and the REP is able to provide service at the new location.

Reliant proposed that if the commission does decide to allow REPs to require evidence of relocation it be limited to a forwarding address. Reliant realized that in some cases a customer cannot provide a forwarding address and the commission should establish a process that accommodates a customer who cannot provide the required information.

Commission response

The commission notes that its current rule does not permit a termination penalty to be assessed in the event that a customer moves to a different location, regardless of whether the customer moves next door or to a different state. Permitting a REP to require the customer to provide evidence that the customer is indeed moving is appropriate to permit the REP to protect itself if a customer were to falsely claim to be moving. The commission does not believe that it needs to specify the kind of evidence that must be provided. It also concludes that it is appropriate to permit the REP to require the customers to provide a forwarding address so that a REP may send a final bill. The commission amends the rule accordingly.

Question 2: What customer protections should be delineated in the waiver for commercial customers contemplated in the proposed §25.475(j)?

ARM, TEAM, ConocoPhilips, TIEC, Tara, TXU, Reliant, Gateway and First Choice did not support the proposed waiver in subsection (j). They argued that by statute and commission rule certain customer protections cannot be waived such as the right to choose a REP, protections from unfair, misleading and deceptive information, customer complaint provisions and unauthorized charges. First Choice, Gateway and Tara argued that no other protections need to be delineated in the agreement because commercial customers have expectations different from residential and small commercial customers when buying electric service and they are used to negotiating price, length of contract, and other terms with the retail electric provider and with other entities with which they do business. Tara also stated that business owners can solicit advice from aggregators, brokers, or counsel and are already sufficiently protected by the laws of contract. ARM stated that as a practical matter, commercial customers usually negotiate over weeks or months and when they are ready to sign the contract they want it to go into effect right away, not to wait for the rescission period. Reliant commented that the proposed subsection (j) does not meet the requirements of PURA §39.001(d), which states that regulatory authorities, "shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition."

ARM stated that if something were required, then citing to the commission's website should suffice. ARM and Tara argued that the waiver would be a burden and additional cost on REPs especially if existing terms of service had to be revised when a rule changed.

TXU offered that if the commission wants to address the situation of customers not appreciating the negotiated terms to which they are agreeing, the commission could require REPs to put express waivers of customer protection rights in bold font in a stand

alone or boxed paragraph and require that such waivers include instructions on accessing the commission's customer protection rules. Alternatively, TXU suggested that the commission might consider raising the kilowatt (kW) level for customers to which such a requirement would apply to 75 kW or eliminating the ability to aggregate customers to reach the minimum requirement. ConocoPhilips and TIEC argued that this proposal is unnecessary for Option 1 REPs and other customers with load above one megawatt (MW).

Public Utility Brokers stated that there were certain provisions that when waived would allow the customer to get a lower price such as the requirement to provide an Electricity Facts Label (EFL), Terms of Service (TOS) and Your Rights As a Customer (YRAC) and the requirement that the contract ends if the customer moves to a different location. They recommended that a provision be added to a contract or terms of service document of any customer waiving the customer protection rules stating that the customer has consulted with an attorney and the customer voluntarily waives its rights, if any, although they also stated that customers should not need to consult an attorney to shop for electric service.

Texas ROSE/TLSC and OPC stated that the rule should require a REP to delineate all of the rights a customer is waiving, as the only fair disclosure is a full disclosure of all rights a customer is waiving when entering into an agreement. OPC suggested REPs create a checklist of waivers and have the customer initial each specific right that the customer is waiving.

Commission response

The commission has deleted proposed §25.475(j) because it is unnecessarily burdensome given that waiver of customer protections for customers at or above 50 kW is adequately addressed by §25.471(a)(3) of this title (relating to General Provisions of Customer Protection Rules).

Question 3: Should there be a disclosure statement in the contract for the purchase of electricity by a REP from a Distributed Renewable Generation (DRG) owner or Independent School District Solar Generation Owner? If so, what specific disclosures should be required?

ARM, OPC, Reliant, First Choice and Tara did not support disclosure statements in contracts between REPs and these DRG owners. ARM added that if the commission did not wish to leave such disclosure to market incentives, it might require disclosure in the limited instance where a REP's retail product is bundled with an agreement to purchase the customer's DRG. ARM suggested that such a plan's contract documents (especially the EFL) include the pricing and terms of purchase. Reliant suggested that REPs should be permitted to include such disclosures in their terms of service at each REP's discretion. Tara observed that a "one size fits all" DRG disclosure would not capture all the variables in such a transaction, such as scheduling, pricing and delivery for each customer.

TXU supported DRG disclosures because the distributed generation could affect load profiles. TXU commented that the disclosure would help keep track of total DRG and facilitate payments to both the generator and the Transmission and Distribution Utility (TDU). In order to meet these ends, TXU suggested that the disclosures include the type and size of the generation resource. OPC commented that a separate agreement between a REP and a DRG owner should contain enough detail for both parties to understand all the terms of sale of the generation, limitations on liability, and other standard provisions for this type of transaction.

Commission response

The commission agrees with Tara that a "one size fits all" DRG disclosure would not capture all of the variables that a customer might need to decide whether or not to purchase a product from the REP. The commission does find that the customer needs to know whether or not the REP will purchase the excess generation and the terms of the purchase. The commission agrees with OPC that these terms could be set out in a separate document rather than in the terms of service documents described in this rule. The commission also agrees that a line should be added to the EFL that describes whether the REP buys DRG.

Question 4: Should the commission allow products for residential and small commercial customers that do not have a method of determining the price from a publicly available data or otherwise independent of the retailer's proprietary knowledge? If so, can these be considered contracts because there may not be a meeting of the minds on price?

Gateway, First Choice, TEAM, Reliant, ARM, Green Mountain and Tara supported allowing products for which a method of determining price is not specified. TEAM stated that customers have the power to choose, and when customers choose a product which does not have a published formula for determining price, the customer has made an informed and conscious decision and thus, there has been a meeting of the minds and the parties have entered into a valid contract. Green Mountain argued that if a REP is required to include in its contract the specific price to be charged at all points in time during the term of the contract, or if the REP is allowed to offer a variable price product only if the price is tied to an objective index or formula or so long as the REP provides advance notice to their customer of any price changes, then REPs will be required to build into their prices a premium to cover the risk that the costs to supply the required power will increase.

ARM supported the commission's effort to improve the quality and usefulness of the information that REPs disclose to customers, yet it did not believe that the goal of improved customer disclosure should be achieved through proscribing the type of contracts the REP may or may not offer in the competitive market. ARM stated that an agreement between a REP and a customer for a variable price product reflects a meeting of the minds in that both parties agree that the price may change at the REP's discretion without reference to an index or other publicly available criteria. ARM noted that in the context of sale of goods, TEXAS BUSINESS AND COMMERCE CODE ANNOTATED §2.305(a)(1) states that parties may conclude a contract for sale even if the price is open, that is, a specific price or methodology for setting a price is not settled. Under this provision, ARM pointed out, the price charged at the time of delivery of the product or service is deemed to be reasonable if nothing is said about price in the agreement between the two parties. In contrast, although a specific price or a third-party standard is not delineated in a contract for a variable price product, the contract nevertheless addresses the subject of price in stating that the price may vary at the discretion of the REP. If a contract exists when no price is agreed upon, as contemplated by TEXAS BUSINESS AND COMMERCE CODE ANNOTATED §2.305(a)(1), then a contract must also exist when the agreement contemplates that the REP will set the price for each billing interval pursuant a variable pricing arrangement.

Tara argued that REPs should continue to be allowed to protect proprietary pricing methodologies they develop. Tara stated that experienced and sophisticated REPs must factor a great deal of information into their pricing methodologies, *e.g.,* overhead, market prices for materials, price for supply contracts, hedging. Tara argued that if it were required to make public the proprietary formulas that it would be detrimental to the REP and to competition. TEAM agreed and stated that requiring disclosure of a trade secret formula or methodology is not only legally problematic, it does not give the customer any greater ability to ascertain how the price might change. For example, a customer who knows its price formula employs a multiplier of the Market Clearing Price for Energy (MCPE) would still have no way of predicting the price spikes in the wholesale market. Public Utility Brokers were concerned with these positions and stated that any business would love to sell a defined amount of widgets under contract with a price that can only be determined by the seller with no logical reason and change at its whim, without notice to or acceptance by the customer. However, Public Utility Brokers argued, adopting such a rule would put Texans in harm's way and tie the customer's hands.

TXU agreed that plans that allow price increases at the discretion of the REP (outside of a contract period where a REP guarantees full or limited price protection) are important tools for the REPs to adjust pricing in response to changes in wholesale market conditions, as long as the ability for the REP to increase the price is adequately disclosed to the customer when enrolling in the plan, and as long as the customer is provided adequate advance notice when the REP decides to increase the price. However, TXU commented that, the commission should not allow plans for residential and small commercial customers that essentially allow the price for electricity to increase at the discretion of the REP without adequate advanced notice to customers of such price increases. TXU offered examples of REP disclosures that provided vague statements as to how, when and how much a price could increase. In one example, a customer contract stated, "month-to-month customers are subject to rate adjustments throughout the term of this agreement, but not more than once per billing cycle, to reflect changes in market costs and the cost of fuel used to generate electricity." Under that contact, the customer received the 9.9cents/kWh on their first and second bills but the price increased 40 days later without advance notice, to 13.5 cents/kWh. On the customers fourth bill the price increased again to 14.7 cents/kWh and again to 16.7 cents/kWH. TXU said that it is hard to believe that customers signing up for a 9.9 cents/kWh plan would understand through the general disclaimer that their price might increase by almost 70% to 16.7 cents/kWh in just a few months. TXU did not believe that such non-transparent pricing strategies were beneficial for customers or for the future of a successful competitive electric market. TXU argued that such actions and interpretations might not result in a meeting of the minds concerning price which is an essential element of the contract between a REP and its customer. Green Mountain stated its belief that a rule requiring advance notice of any price increases for a variable price product would provide an undue competitive advantage to companies that include a retail business and generation resources, as the generation side of such enterprises would see increased revenues during periods of upward volatility that would offset losses in the retail business.

Public Utility Brokers, Cities and Texas ROSE/TLSC were not in favor of allowing contracts for residential and small commercial customers that do not have a method of determining price. Texas ROSE/TLSC stated that the price a customer is charged is of paramount importance to customers and should not be a mystery or surprise. Texas ROSE/TLSC argued that the price should be fixed or it should be able to change based on factors known to the customer when entering into the agreement. Public Utility Brokers stated that it is imperative that a customer of any size have the ability to audit its billing for correctness, and that allowing a REP to bill for a service that is undefined, considered proprietary or vague is inconsistent with PURA §17.151. Public Utility Brokers also stated that allowing such contracts would put all customers at risk and give REPs a blank check from the customer.

Reliant stated that a meeting of the minds to establish a valid contract could be reached based on the current price of a product and the customer's knowledge of how the price could change.

Commission response

The commission does not believe that it needs to address Tara's contention that a customer's price can be a trade secret. The commission is not adopting any requirement to which that contention is relevant. The commission agrees with ARM *et al.* that there is value in a competitive market for products of all types and that providing REPs flexibility to change the price when market conditions change could result in lower prices for customers. The commission is not precluding REPs from offering products for which the price can change at the REP's discretion, but it believes that the customer information documents must clearly disclose the nature of a variable price product: (1) the REP must disclose the price that will be billed on the first month's bill and make available a recent price history for products that are variable and (2) must provide a description of how the price for the product is determined or a notice in bold print that states the price can change at the discretion of the REP.

Question 5: If the commission retains a variable price product should there be additional customer protections put in place? If so, what additional protections should the commission put in place?

ARM, Green Mountain and Gateway did not feel that additional customer protections were necessary as long as the EFL clearly and comprehensively discloses that the retail product is subject to variable pricing and how and when the price may change. First Choice and Public Utility Brokers stated that the current customer protections were enough as long as they were enforced. Reliant proposed that the current price should be easily available and the frequency of potential price changes should be disclosed. TEAM commented that as long as no one provider has dominant market power, the competitive market will provide adequate downward pressure on this type of variable pricing. Public Utility Brokers stated that the customer should be thoroughly informed about what charges will appear and how the charges will be calculated. Texas ROSE/TLSC proposed that REPs make publicly available the price charged to the customer taking the plan over the previous 12 months. Tara supported REPs being required to identify which cost components are variable. Cities stated that if the REP offers a variable price product then the terms of service should clearly and expressly state the method by which the price can change. Green Mountain argued that customers who prefer a product that insulates them from pricing volatility and risk will choose a fixed price product or a variable product that includes a promise from the REP that it will provide 45 days advance written notice or choose a product that provides the price on its website. Green Mountain concluded that a regulatory requirement is unnecessary or inappropriate, as there may be a competitive solution to the perceived problem.

Cities expressed concern that customers are likely to choose a discretionary price plan because it offers the lowest price and the complete variability and opacity of the rate would only be evident by an examination of the contract that a layperson is likely unable to perform. In view of these risks, Cities supported a rule that would preclude these types of plans under the variable product category and to the extent that the commission chooses to permit these contracts, Cities argued that special protections for consumers should be employed such as a clear and prominent disclosure that the REP can change the price offered under the plan for any reason or no reason. TEAM disagreed and stated that it is no mystery to customers that variable rate products are subject to price changes and the suggestions would add little transparency to the market but would add costs to those customers who voluntarily chose a variable rate product.

Reliant proposed that the current price of the product should be easily available and the frequency of potential price changes should be disclosed. OPC was not opposed to Reliant's suggestion but added that the requirement should include the percentage of potential price change be disclosed to the customer at enrollment. Gateway stated that additional customer protections are not necessary for this type of product and if the customer agrees to this type of product they are fully aware that it is variable and that it can and will change.

Direct Energy suggested that if a product with price changes limited to the REP's discretion is allowed then it could be limited in a percentage amount over the previous month's price and fully disclosed to the customer at the time of enrollment.

OPC stated that if the commission does retain a variable price product in which the price change is not known by the customer, the REP should either provide customers with prior notice or with a range for which the price could change, without which the customer's bill could potentially increase by extremely high amounts overnight. Direct Energy stated that for month-to-month contracts "the life of the contract" is indeterminate because the customer can perpetually remain on the service as the contract renews each month. So OPC's request is in direct conflict with one of the functions of a variable product, to allow a REP to respond quickly to changing market conditions that cannot be predicted. TEAM added that it is a misconception that variable rates only increase. TEAM stated that when wholesale energy prices and especially when natural gas prices move downward, variable rates drop with them. TEAM stated the reality is that REPs experience significant volatility in the wholesale market and in the ancillary services markets and if some sort of price control is put on the retail side, there would need to be a corollary control on the wholesale side of the equation. TEAM agreed with OPC that if there is a potential range of price changes, this possibility should be included on the EFL but that the commission shouldn't mandate a limit in the extent of price changes that are permitted. OPC stated that if the commission does allow variable price products, REPs offering these products should be required to provide customers with a notice of price changes and allow them 45 days from receipt of notice to switch providers without penalty or limit the change in price each month and over the term of the agreement and disclose in the EFL the amount of change that could take place.

TXU stated that §25.475 has always allowed REPs to provide necessary pricing disclosures to customers in one of two ways: either though a "fixed" price or through the disclosure of a "variable" price plan. Although experience has exposed flaws in both of the labels, the goal has always been clear--to ensure that the customer know what the price would be before using electricity, either through the disclosure of a specific price or through the disclosure of a verifiable formula or index and thereby protecting the customer from a REP increasing the price without advanced notice to the customer which would allow the customer to make a meaningful choice as necessary. Therefore the rule has been intended to ensure that the customer would be armed with the information necessary to make timely informed decisions. Unfortunately gaps in the two definitions have surfaced and while the proposed rule makes strides to address the problems related to "fixed" price plans it appears to allow REPs to satisfy the notice requirements for variable plans through no more than general, unverifiable descriptors and leave price increases entirely within the discretion of the REP. Thus the rule has failed to provide the customer with sufficient detail regarding how and when the price would change. As a result the market has spawned plans with prices customers pay for a short term (or might not ever pay) which are then replaced without any advanced notice by prices that the customer never meaningfully agreed to pay or had adequate opportunity to anticipate, plan for and act upon in a timely and informed manner. Accordingly, the commission should require REPs to provide 45 days notice before increasing the price of variable price plans whose prices may increase according to a method that is not based on verifiable formula that leaves price increases out of the REPs discretion. This amount of notice is the minimum to give the customer the opportunity to effectuate a switch.

ARM pointed out that TXU's proposed notice requirement might apply to all variable price products regardless of whether the price changed according to seasonal factors or the price of natural gas. ARM also assumed that the 45-day notice required by TXU was not just an informational notice but a notice of material change which would allow the customer to change REPs which ARM viewed as punitive, as it costs money to notify all customers and exposes the REP to the possibility of losing the customer. ARM reiterated its belief that variable price products have value in the competitive market that should not be compromised.

TXU proposed that if the commission does not require a 45-day advanced notice then it should prescribe that the EFL contain a disclaimer that the actual price disclosed is for the first month of service and that the actual price for electricity may increase each month. TXU argued that customers are often drawn to variable price products, not for the fact that such products are variable but because the initial rate advertised for such product is attractively low. Direct Energy argued that when the REP, at the time of enrollment, has indicated the monthly increase, 45-day notice would seem to have little benefit and do nothing but increase REP costs, which will ultimately increase customer's prices as the REP would have to build a 45-day hedge into the price. Direct Energy also argued that month-to-month products are designed to give both the REP and the customer maximum flexibility and advance notice of a price change limits that flexibility.

Texas ROSE/TLSC proposed that several customer protections be put in place, such as a requirement to provide the formula under which the price would change that can be calculated by the customer, a requirement that a variable price product not have a minimum contract term greater than 30 days, a requirement to notify the customer of the ability to request an expedited switch whenever a notice of price change is provided to the customer and a requirement to provide the customer notice of any change in price more than 5% in any given billing period.

Commission response

The commission agrees that there is value in a competitive market for products of all types and that providing REPs flexibility to change the price when market conditions change could result in lower prices for customers. The rule that the commission is adopting emphasizes providing accurate information to customers and prominent disclosure where a product is one in which the REP has the discretion to change rates in a way that is not tied to any publicly available index. For variable price products, including those with a defined percentage variance, the commission finds that a residential customer should be provided instructions on the bill regarding how to obtain information about the price that will apply on the next bill. Persons who are shopping for electric service should be provided with an EFL that shows the price that will apply on the first bill and for residential customers, instructions for obtaining a price history. The price history can be made available through the company's website and another source, such as a toll-free number. The commission also finds that not all customers have the risk tolerance for these types of products and should be notified that prices for variable products can change to a much higher rate and agrees with Cities that the EFL should contain a notice in bold print that states the price can change at the discretion of the REP, unless the price will increase by no more than a percentage amount from month-to-month, in which case the percentage increase shall be disclosed on the EFL.

Question 6: Is 50 kW the appropriate threshold for allowing waiver of the standard protections in the commission's rules?

ARM and Gateway contended that all non-residential customers should be allowed to waive the commission's customer protection provisions as they generally are more sophisticated and have the benefit of counsel and internal/external expertise when engaging in business transactions of any size. ARM also noted that its desire to have the rule apply only to residential customers couldn't be accomplished in the present rulemaking as it would require a change to §25.471(a)(3) and that rule is not included in the scope of this proceeding. Alternatively, ARM conceded, the commission could keep the application consistent with the current §25.475 as there is no compelling reason for expanding the rule's scope in this manner. Tara suggested the size be lowered to 25 kW.

Reliant, TXU, First Choice and TEAM supported keeping the standard at 50 kW. Reliant stated that the marketplace has been operating under the 50 kW threshold for allowing waiver of customer protections since the market opened. Although several parties filed comments on the strawman to this rule suggesting that the current threshold is not appropriate, Reliant maintained that there is no evidence that the current threshold is not appropriate and supported maintaining the current 50 kW threshold. TXU agreed, stating that customers below the 50 kW threshold are commercial strip center tenants and those above the threshold are typically stand alone restaurants and other businesses that are generally sophisticated enough to engage in negotiating an innovative electricity contract. First Choice also supported the current definition for small commercial customer and recommended that a small commercial customer with a demand in excess of 50 kW should not be required to affirmatively waive the commission's customer protections. TEAM stated that nothing in the rule should prohibit commercial customers at 50 kW or below from waiving the requirements of this rule, as these customers are large enough and sophisticated enough to negotiate and contract for electric service.

TXU offered, if the commission has seen examples of commercial customers with somewhat more load than 50kW who have been potentially harmed by waiving customer protection rules without appreciably understanding the meaning of such waiver, TXU Energy could support increasing the threshold to 75 kW and/or requiring the waiver to be more obvious and requiring REPs to expressly indicate to customers how they may access the customer protection rules.

Public Utility Brokers stated that it is ludicrous to assume that just because a customer's usage exceeds 50 kW that their education about deregulation is any better than that of a residential customer. Public Utility Brokers stated that it has met with industrial customers that did not know what ancillary services were, let alone how they impacted their energy bill.

OPC argued that the threshold should be set at a level higher than 50 kW as customers with as little demand as 50 kW most likely do not have the resources to spend on contract negotiations with a REP. OPC also noted that the establishment of a Power-to-Choose type web site for small commercial customers would be useful.

Commission response

The commission agrees with Reliant, TXU, First Choice and TEAM that the commission's current 50 kW standard is appropriate for the waiver of customer protections, as it has not seen undue harm resulting from the current standards.

General comments

Direct Energy argued that the problems faced in the summer of 2008 were not primarily caused by issues being addressed in this rulemaking and does not believe that making wholesale changes to §25.475 is necessary nor does it warrant the cost of implementation that REPs would bear and the re-learning costs that customers would face. Direct Energy recommended that the commission focus on its current review of the financial and technical requirements for REP certification as that would ensure reasonable standards so that consumers will be able to trust that REPs will be motivated and capable of providing service.

Public Utility Brokers urged the commission to understand the important role it plays in overseeing the deregulated market to ensure that the bargaining strength of customer and REPs are relatively balanced. Public Utility Brokers stated that this proceeding should focus on improving the protections of customer and not serve as a vehicle to allow REPs to ask for and obtain more lax rules.

Commission response

There were a number of problems that arose in 2008. One of them was that customers were on contracts that they did not understand or that were not clear. Some of these customers believed that they had fixed-price products but learned that their REPs regarded them as variable-price products. When wholesale prices rose abruptly and the REPs increased their rates, the customers' expectations were frustrated. While these were not new issues, they became acute, because of the wholesale-market price increases. This rulemaking was undertaken to address a variety of issues in the competitive market, and lack of clarity in customers' terms of service is one of them. This lack of clarity has been seen in provisions that are buried in Terms of Service documents, uncertainty as to when contracts begin and expire, uncertainty as to what happens at the end of a contract term, and others. The commission agrees with Direct Energy that attention should be given to the REP certification and Provider of Last Re-

sort rules as well, but the issue of clear disclosure of important terms of service is important and is addressed in this rule.

Cities noted that in procuring retail electric service customers are presented with an array of often complex retail offerings described in different ways by different REPs and qualified by dense contractual language that the layperson has little chance of fully deciphering.

Commission response

The commission agrees that contract terms have been confusing in the past and intends for this rule to address these issues by having an EFL document that highlights terms of service that are important to customers.

Subsection (a)

ConocoPhilips and TIEC commented that the rule should not apply to Option 2 REPs or to Option 1 REPs marketing to customers that are one MW or above. ConocoPhilips stated that Option 2 REPs do not use mass marketing and the types of products and contractual terms in the proposed rule do not make sense for a large customer like ConocoPhilips, which is serving its own load. TIEC stated that industrial customers have highly specified electrical needs that necessitate flexibility and ingenuity in contracting. ARM and Reliant agreed with ConocoPhilips and TIEC but stated that this rule should not apply to commercial customers under one MW either and argued that the rule should apply only to residential customers and in the alternative to small commercial customers.

Commission response

The commission agrees with TIEC and ConocoPhilips that this rule should not apply to Option 2 REPs or customers with a load over one MW. The commission clarifies that the rule applies to REPs serving residential and small commercial customers.

ARM, Tara, TEAM, Reliant and Gateway argued that three months is not enough time to conform contracts and arrange business processes to meet the requirements of the rule, and the compliance timeline should be extended to six months at a minimum. Tara argued that three months is not enough for an entire industry of similar businesses to completely revise their product lines and education and re-train their relevant sales, marketing and service personnel, revise standard contracts and forms, reconfigure templates, databases, software and revise promotional and educational materials, let alone educate customers. Reliant stated that it is unclear whether the proposed subsection (a) requires automatic renewals to meet the new requirements before the end of the existing contract. Reliant stated that new requirements related to automatic renewals should apply relatively soon and to the extent that contracts must be revised to conform to the new automatic renewal provisions they should be changed within the same six month implementation period. Reliant stated that all contracts entered into after December 31, 2008 should comply with the new requirements. TXU suggested an exception be made to make it clear that the exception applies for plans longer than 31 days. TXU also argued that there would be little benefit to updating contracts a REP is no longer offering and proposed to make clear that the contract documents for such plans are exempted from the application of the proposed rule.

Commission response

The commission agrees with Reliant that new contracts should comply with the new rules as soon as possible but realizes that REPs will need some time to prepare new contract documents. The commission agrees with ARM *et al.* that more than three months is needed to conform contracts with the new rule. Therefore, the commission extends the time from three months to five months.

The commission clarifies the application of the rule to existing contracts; the rule will provide REPs up to five months to conform contracts and product documents with the requirements adopted in this rule. As additional clarification, the commission adds language to specify that if a term contract is in effect on the date that this rule becomes effective, then no later than five months after the effective date, a REP is required to begin providing customers with notice of expiration as required by subsection (e) of the rule as adopted.

Cities stated that when choosing a REP, a residential or small commercial consumer must rely on information conveyed by the REP and the accuracy of the information is critical to the protection of consumers. Customers must have assurance that the retail electric product that they have been promised is actually the product that is delivered.

Texas ROSE/TLSC proposed that REPs and aggregators be responsible for the accuracy of all representations made by their employees and contractors. OPC suggested that REPs and aggregators be responsible for *truthful* representations to customers and prospective customers. TXU suggested that the applicability provisions be modified to make clear that the rule applies with equal force even if someone other than a REP or aggregator makes the representation on behalf of the REP or aggregator.

TXU suggested that the phrase "or other means" is too broad and the purpose of the rule would be met if the rule is made applicable to representations made through advertising or marketing of any kind.

Commission response

The commission agrees with Cities and OPC that REPs should be held responsible for making truthful representations and that customers should receive what they were promised. This section is intended to hold the REP accountable for all representations, with the presumption that if the representation is not truthful, there may be negative consequences. The commission also agrees with TXU and Texas ROSE/TLSC that the REP is responsible for representations made by employees or other agents of the REP and clarifies the rule accordingly. The commission agrees with TXU that marketing should be included but does not change or omit the phrase "or other means" as it is intentionally broad to capture all ways that representations can be made. This provision has been moved to subsection (i).

TXU stated that the law generally distinguishes between "products" and "services" particularly for the purposes of liability and it is not clear that the electricity products addressed by the proposed rule are "products" as that term is used in the law. TXU suggested avoiding the term product and replacing it with plan. ARM stated that this was far from solved in Texas but did not object to changing the term to plan.

Commission response

The commission believes that this change is unnecessary, because the commission's categorization of electricity plans as a product or service would not affect a REP's liability to a customer.

Subsection (b)(1)--Affirmative consent

ARM recommended that the proposed definition of affirmative consent be revised to require the re-enrollment of a customer using the process outlined by ARM in proposed subsection (f)(5) and the elimination of the reference to §25.474 as the process proposed in subsection (f)(5) is better suited to the re-enrollment of a customer. The additional proposed language should not be included if references to enroll and enrollment are not also used in proposed subsection (f)(5). TEAM stated that this definition was unnecessary since the only place it is used is in subsection (f).

Commission response

The commission believes that this definition is unnecessary and has deleted it.

Subsection (b)(2)--Automatic renewal

Reliant proposed a modification to clarify that automatic renewals do not require a material change notice. ARM recommended that a revision be made so that it is clear that the customer does not need to provide affirmative consent prior to the end of the contract term as long as the contract includes an automatic renewal provision to which the customer has already agreed.

Commission response

The commission concludes that renewal without affirmative consent is limited to the default renewal month-to-month contract presented to the customer in the notice of contract expiration. Therefore, a definition of "automatic renewal" is unnecessary. Notice is important at the end of the initial term of a term plan, because the customer may want to shop for other service options.

Subsection (b)(5)--Contract period

ARM recommended for uniform usage that the defined term "contract period" be changed to "contract term" and to clarify the distinction between this definition and the one ARM proposed for "contract expiration."

Commission response

The commission agrees with ARM that "contract period" should be renamed "contract term," but the definition will still be the time period the contract is in effect. The commission adds a definition of contract expiration to further clarify.

Subsection (b)(6)--Guaranteed fixed price product

Reliant, Direct Energy, and Green Mountain supported the elimination of the product types, but if the commission decides to keep the product types, they suggested deleting the guaranteed fixed price product. Texas ROSE/TLSC supported eliminating this product, suggesting that the rule recognize only two products: fixed and variable products. Gexa suggested changing the guaranteed fixed price product to a fixed price charge and requiring all charges to be listed as fixed or variable. OPC stated that the only product that should be allowed to be called "fixed" should be fixed even if TDU charges and ERCOT fees change; in its view a product with a price that is subject to change, no matter what the change is based upon, is variable. TXU argued that this product should be allowed to vary based upon seasonal or usage block factors. Direct Energy suggested if the commission retained this product that definition be changed to "guaranteed price product" and be used only if the commission is able to ensure that customers have recourse to collateral that provides full compensation through an appropriate financial instrument provided by the REP that is offering the product; otherwise the guarantee the customer receives is not guaranteed and it is likely that this promise will not be kept.

First Choice supported returning to the proposed definition of guaranteed fixed price product, before the August 13, 2008 staff memo, asserting that the new definition effectively imposes price caps on REPs that are inconsistent with the competitive market.

Commission response

The commission finds that the definition of the "fixed rate" products does not preclude a REP from offering a product such as the proposed guaranteed fixed price product. Therefore, designating guaranteed fixed as a separate product is unnecessary.

Subsection (b)(6)--Indexed product

TEAM proposed that variations in ancillary service costs be included in the definition of indexed product, arguing that even though they are not publicly available, they significantly affect the cost of wholesale power. TEAM proposed to change the definition of "publicly available" to verifiable, as those numbers would be available through ERCOT and customers would be assured that the charges were beyond the REP's control. Texas ROSE/TLSC supported eliminating this product and having only two products: fixed and variable products. OPC proposed to eliminate this product, concluding that any charge that is not fixed is variable. Cities argued that indexed is really a subset of variable and should be combined into the variable definition to reduce opportunities for confusion.

Direct Energy argued that indexed products are much less customer friendly than a bandwidth product where the REP discloses how much the price can change during a billing period. Direct Energy pointed out that today's POLR price is an index and customers were disappointed with the notice and operation of that structure, and customers on indexed pricing plans may experience significant price volatility because of the nature of the product. TEAM agreed with Direct Energy that disclosure of the formula doesn't give the customer any greater ability to ascertain how their price might change. It pointed out that a customer last summer on an MCPE product would have experienced price spikes from the wholesale market, whereas a customer under a typical variable product would likely not have seen the same volatility in their price.

Commission response

The commission disagrees with TEAM that ancillary services or any other charge that cannot be verified by the customer should be included in an indexed product. Under TEAM's proposal, a customer would have no ability to verify that the ancillary services portion was calculated and charged to the customer correctly. The commission disagrees with OPC and Cities that this product should be eliminated because it is variable. The purpose of these classifications is to assist customers by giving them a shorthand description of a plan that will facilitate comparing it to other similar plans. The commission concludes that the idea of an indexed price is one that has a logical meaning in the competitive energy market and can be readily understood by customers.

Subsection (b)(8)--Limited fixed price product

First Choice opposed changing this definition. Direct Energy stated that the definition of "limited," meaning having only mediocre talent or range of ability, implies that the product is weak or of lesser value than other products. It concluded that the label would do more to damage a product's marketability

than it would to help customers understand their real choices. TXU and Reliant argued that this product should be allowed to vary based upon seasonal or usage block factors. Direct Energy argued that seasonal factors amount to price changes and therefore, should not be included in this category. TEAM stated that this concept could serve to confuse customers. Direct Energy also stated that it had identified no competitive disadvantage to placing these seasonal products in the variable category.

TXU proposed to eliminate the reference to "TDU recurring charges" and argued that the definition should just refer to "recurring charges." TXU also suggested changing the name of this product to help eliminate potential customer confusion about the fact that there may be some variation, although TXU could not suggest a better name. TEAM suggested it be made clear that "federal, state and local laws" includes statutes or ordinances passed by any authorized entity including ERCOT protocols and commission rules. Direct Energy, ARM, Texas ROSE/TLSC suggested combining both types of fixed products into one product, termed fixed price product and allowing changes in the rates that result from TDU charges, ERCOT and Texas Regional Entity (TRE) fees and charges resulting from laws that impose new fees or costs on the REP. Reliant stated that the important factor in a fixed contract is not whether the price is fixed but whether the price is known and that the term "billing period" should be eliminated. Texas ROSE/TLSC proposed to clarify that the term of a fixed product must be disclosed and not change throughout the term of the contract. Green Mountain supported Reliant's proposed definition of fixed price product. Tara argued that the definition indicates a concession that some cost components can be fixed without causing confusion but the proposed rule arbitrarily bars REPs from marketing products that offer to fix different price components. Direct Energy also did not like the term "limited," as it felt that it could be misconstrued as having less price commitment than many variable products. Cities supported this product and its distinction from the guaranteed fixed price product and viewed as a positive change that certain products that REPs have marketed as fixed price plans must now be presented as variable.

TEAM argued that REPs should be able to use the term fixed for some but not all components of the bill and that the rules should require adequate disclosure of the prices, terms and conditions of the product to customers by requiring the REP to disclose which if any of the components of a bill are fixed.

Commission response

The commission is eliminating the definition of the "limited fixed" price product. The definition of "fixed rate product" does not preclude a REP from offering a product such as that described by the proposed guaranteed fixed price definition. With respect to the "fixed rate" product, the commission is adopting a definition that limits this product to products with a term of at least three months, rather than at least six months. The commission also clarifies that for the fixed rate product, ERCOT fees include fees approved by the commission and charged to loads, such as the ERCOT administrative fee and nodal fee (should it be charged to loads in the future). Under this definition, ERCOT fees would not include ancillary services, losses or unaccounted for energy charges or TRE penalties.

Subsection (b)(8)--Price

Gateway argued that price should not include TDU charges. Reliant proposed to exclude applicable taxes. Tara suggested the price definition should be revised to clarify that each product's price will vary according to the energy used. ARM agreed with Tara and Reliant and proposed a new definition of price.

Commission response

The commission disagrees with Gateway that the definition of price should exclude TDU charges, as some REPs may choose to offer a bundled product that includes some or all TDU charges. This should be reflected on the EFL so that customers can make better-informed comparisons. The commission does not agree with Tara's suggestion; the term "price" is defined, in part, to provide a description for calculation of prices in an EFL, and this calculation typically includes both energy-related costs and costs that are not energy-related. The commission agrees with Reliant's comment that price should exclude applicable taxes and clarifies the definition of price by excluding state and local sales taxes and miscellaneous gross receipts taxes. The commission notes that state miscellaneous gross receipts tax is imposed on companies making local sales of electricity within an incorporated city or town having a population more than 1,000, and the rate varies depending on the population of the city where the meter is located. Because this tax is related to the specific location of the customer's meter, it is appropriate to exclude it from the general averaged kWh price. The customer should be able to make apples to apples comparisons of prices excluding taxes. The commission also deletes, "but may exclude non-recurring charges" from the definition to avoid any confusion that such charges or credits may also be included in the price calculation.

Subsection (b)(9)--Recurring charge

TXU expressed concern about the definition of recurring charge, contending that collapsing all of the charges that appear in three or more billing periods, even the charges that are outside of a REP's control, seems to be at odds with two public policy goals. First, collapsing all of the charges has the effect of camouflaging them, instead of giving customers more information regarding what they are really paying for. Thus, the use of recurring charges provides less information and less transparency. Second, the collapsing of charges into the per kWh charge has the effect of increasing the per kWh price that customers and critics alike look to as a measure of the success or failure of the competitive market. Artificially and unnecessarily increasing the apparent price of energy in the price per kWh would seem to mislead customers into thinking that the price is higher. From a practical point of view the proposed definition is also troubling for two reasons. First, although the language is not entirely clear, a particular charge could change from a non-recurring charge to a recurring charge or vice-versa by virtue of changes in the expectations regarding that charge and the number of times it appears on the customer's bill. Second, lack of clarity in the concept could result in REPs differentially treating charges as recurring. This would prevent an apples to apples comparison of prices. TXU proposes clarifying the definition of "recurring charge" to ensure that REPs understand which specific charges should be treated as recurring and, thus reflected in the total average price for electricity that must be disclosed in the EFL and monthly customer bills. For example, TXU stated that it is unclear whether the ERCOT System Administration Fee, TRE Fee, Public Utility Commission assessment, and Gross Receipts Tax Reimbursements are considered recurring charges that must be included in the total average price per kWh on a customer's EFL and bills, or whether they may merely be identified to customers in the EFL or TOS and then billed as line items on the bill and not included in the total average price/kWh. Currently REPs are treating these

fees and assessments differently which is preventing customers from making an apples to apples price comparison. Accordingly, TXU suggested that if there are specific assessments and fees the commission desires not to include in the total average price per kWh on the EFL, then the commission should exclude them from the definition of recurring charges.

First Choice commented that the definition of recurring charge should specifically excludes sales taxes, any special charge for underground service or similar charges only applicable in a portion of a TDU service area and any reimbursement of Public Utility assessment fee or gross receipts tax, since REPs have no control over such charges or credits. Reliant disagreed that these charges should not be considered recurring. Reliant did agree that taxes, gross receipts taxes and PUC assessment should not be included in the recurring charges that are used to determine the average prices on the EFL. Therefore Reliant recommended revising the definition of price to recognize that while some charges might be recurring, they should not be included in the calculation of the average price on the EFL or invoice. OPC proposed that the charges be listed separately on the customer's bill and to strike the requirement that charges that appear in three billing periods be included in the definition.

Reliant proposed a minor modification of recurring charge that recognizes that most customers do not purchase electric service on a calendar year basis and proposed to change calendar year to 12-month billing period. ARM agreed with TXU's and Reliant's changes.

Commission response

The commission agrees that to achieve an apples to apples comparison among all service plans, including the same charges in the calculation is important. It is also important that the customer see all of the charges, excluding state and local sales taxes, in the price per kWh. The recurring charges that must be included in the total average price per kWh on a customer's EFL and bills shall include, as stated in the definition in subsection (b)(9), all charges that appear on a customer's bill in every billing period or appear in three or more billing periods in a twelve-month period. In response to TXU's comments, the commission concludes that the PUC Assessment, ERCOT System Administration Fee and TRE fee are examples of recurring charges that must be included in the price per kWh on the customer's EFL and bills. The state miscellaneous gross receipts tax may be broken out and billed separately, in addition to state and local sales taxes. Beyond obtaining an accurate comparison among plans, the commission concludes that customers should be able to use the EFL to confirm the accuracy of the first bill under a new variable or fixed rate plan. In addition, if the customer's initial bill reflects kWh consumption approximately equal to the consumption levels displayed on the EFL, the customer should be able to compare the "total average price for electric service" on the EFL and the "average price you paid for electric service" this month on the customer's first bill, and the numbers should be a reasonable match. The commission does not make any changes to the definition of recurring charges, other than to replace "calendar year" with "12-month period." The commission agrees with Reliant that 12-month period is better than calendar year and changes the definition accordingly.

Subsection (b)(11)--Variable price product

Direct Energy, Texas ROSE/TLSC, Cities, Reliant and Green Mountain proposed to combine the proposed indexed and variable price products into one product labeled "variable" if the commission required product labels. TXU expressed concern over the "Wild West" product, in which the REP maintains sole discretion to effectuate a price increase and is not required to provide notice to its customer with respect to such increase. TXU proposed that the definition be changed to require a 45-day advanced notice of price changes. Reliant and ARM disagreed with TXUs proposal, as stated in their response to question 5. Gexa preferred to change the definition to variable charge and to require that each charge be listed on the EFL and identified as "fixed" or "variable." Direct Energy disagreed with Gexa's approached and termed it a step backward from competitive markets and stated that it does not add anything particularly useful to the customer. First Choice suggested that this definition should require that products that fail to contain a disclosed and variable price change trigger should not have a term longer than 31 days. Reliant proposed that the price in the variable price product be required to be available to the customer through a toll-free number, online account access, the REP's website or any other communication method agreed to between the REP and the customer. Green Mountain preferred that the frequency of the potential price changes be disclosed to the customer. Direct Energy proposed to clarify that the pricing of this product could change at the discretion of the REP. Tara agreed that under this proposal a customer who cannot afford guaranteed or limited fixed price products would be relegated to products that can vary entirely, because the fixing of a range of other cost components is prevented by the proposed rule.

Commission response

The commission agrees that there is some value in a competitive market for products that provide REPs flexibility to change the price when market conditions change, as this kind of product could result in lower prices for customers. The commission agrees with Reliant and chooses to allow products for which the price can change by a method not able to be determined by the customer, if it is accompanied by a clear disclosure of the nature of the product. The commission concludes that the current price for the product and its recent price history must be available to a customer or shopper on the company's website and through a toll-free number. In addition, the EFL must disclose how the rate would change or contain a notice in bold print that states the price can change at the discretion of the REP.

Proposed new definitions:

Contract expiration--

ARM proposed a definition to avoid confusion about the meaning of contract expiration versus the end of the contract term. The new definition proposed by ARM is intended to clarify that the term "contract expiration" refers to the limited circumstance in which a contract for retail electric service has expired or is no longer in effect per the terms of the contract. Under §25.488 of this title (relating to Procedures for a Premise with No Service Agreement), the customer may be subject to disconnection of retail electric service when a contract expires or is no longer in effect, unless the customer enters into a new contract for retail electric service. ARM proposed a definition to clarify that contract expiration does not occur if the contract is subject to an automatic renewal provision. Reliant agreed with the concept that ARM proposed but did not support an outcome that would result in REPs being required to issue a contract expiration notice each month. Reliant did not believe there was a difference between renewal and extension as used in ARM's proposed definition and suggested removing the term "extension" from the proposed def-

inition. ARM agreed that it was confusing and submitted a second proposed clarifying definition.

Commission response

The commission disagrees with ARM that "contract expiration" refers to the limited circumstances in which a contract for retail electric service expires or is no longer in effect, in accordance with the terms of the contract. The commission adds a definition of contract expiration as subsection (b)(3) to clarify the commission's intent that contract expiration refers to the time when the initial term of a term contract ends.

Material change--

Texas ROSE/TLSC proposed a definition of material change that would include an increase of 5% or more in the price of a variable price product, any change in the formula or method of determining the price of a variable price product, any change in the term of a variable price product, any change in the frequency with which bills are issued, adding or increasing charges that may be imposed on the customer by the REP or any change in ownership of the REP. ARM agreed that changes in the term or pricing methodology of a product may fall within the scope of a material change but did not believe the other examples listed by Texas ROSE/TSLC are properly within the scope of the term. In particular, ARM did not agree that a price increase for a variable product should be included. ARM also believes that its changes proposed under subsection (e) make Texas ROSE/TLSC's proposed definition unnecessary.

Commission response

The commission believes that no changes to price (other than certain price changes that are clearly disclosed) or length of term can be made to a term contract; however, changes to other provisions are permissible with proper notice. The commission further clarifies that changes to the term length require affirmative consent. Therefore, the commission finds that a material change definition is not needed.

Pricing methodology--

Tara stated that if the intent of the rule is to require detailed, potentially trade-secret pricing formulas, Tara disagrees with the concept and believes its pricing formulas should be protected. If the intent of the proposed rule is to require disclosure of pricing categories but not underlying trade secret formulas then the definition should be modified accordingly.

ARM proposed to add a definition of pricing methodology as it noted that the terms "price" and "pricing methodology" in the proposed rule were not interchangeable. ARM suggested the definition be, "the method used by a REP for establishing and changing the price of a retail electric product which may be indexed, formulaic, or at the REPs discretion."

Commission response

The commission is adopting a rule that no longer contains the term "pricing methodology" so the proposed definition would no longer be useful.

Term contract--

TXU noted that "term contract" is not defined although TDU assumed it meant contracts longer than 31 days. TXU suggested that it would be clearer if the commission described term contracts in this way.

Commission response

The commission agrees with TXU and amends the rule to include a definition for "term contract" as subsection (b)(10).

Subsection (c)(1)(A)

ARM commented that the list of prohibited activities was actually a list of prohibited communications and proposed to modify the rule accordingly. TXU stated that if the commission allows the price of variable price plans to be increased without advanced notice to customers, then this section should be modified to include a requirement that marketing and enrollment materials for variable price plans include a stronger, more obvious disclaimer that the price for such plans may increase without notice. ARM disagreed with this proposal. OPC and Texas ROSE/TLSC agreed. Texas ROSE/TLSC stated that in order to minimize customer confusion, "fixed" should mean "fixed" and all other pricing plans that can change for any reason should be categorized as "variable." Gexa proposed changes consistent with its view that all charges should be listed and identified as variable or fixed and that failing to disclose a fixed commodity charge should be a prohibited activity.

Commission response

The commission agrees with ARM that the list of prohibited activities is actually a list of prohibited communications and modifies subsection (c)(1)(A) accordingly. The commission agrees with TXU, OPC and Texas ROSE/TLSC that variable price plans without advance notice of price increases should include a stronger disclaimer. Therefore, the commission adopts a requirement that the EFL for a variable price product contain an obvious disclaimer that the price may change at the discretion of the REP, unless the price will increase by no more than a percentage amount from month-to-month, in which case the percentage increase shall be disclosed on the EFL.

Tara stated that this language raises several important questions. Tara noted that this proposal no longer refers to federal or state law and questioned whether this means that a REP could be penalized for statements that may be regarded as misleading or anti-competitive but not to the extent they violate any state law. Tara also wondered whether the REP could be fined if a customer stated that the "oral communications" provided by a customer service representative was unclear. Tara wondered what the legal standard or threshold of evidence would be in such a case.

Commission response

The commission notes that PURA is a state law that contains the prohibition against unfair and misleading practices. The rule includes some examples of unfair and misleading practices, but other examples may arise, depending on the circumstances. The commission could seek administrative penalties for misleading practices, whether this rule is adopted or not. Tara's procedural questions do not represent a comment on the proposed rule and require no response.

Subsection (c)(1)(A)(i)

OPC argued that using the word "guaranteed" to market a product that doesn't meet the definition of a guaranteed fixed price product should be a prohibited activity.

Commission response

The commission has eliminated "guaranteed fixed" as a product type.

Subsection (c)(1)(A)(ii)

ARM proposed that this clause be modified to distinguish between retail service in Texas and outside of Texas. Reliant was concerned that this provision was ambiguous and provided two examples that it sought clarification on whether the proposed rule would prohibit particular conduct. One example advertised the lengthy history of a REP's parent company by a REP that became a subsidiary of another organization after its REP certification was issued and an advertising claim by a REP that touted industry experience from a company with roots that date back over 100 years. TXU disagreed that the advertisements cited by Reliant would and should be prohibited by the commission's customer protection rules. TXU argued that a REP should be permitted to make truthful claims regarding its business operations, company philosophies, community involvement and a host of other things that customers may want to know about, such as accurate information about a REP's corporate history of providing electric service or a corporate history having established roots in the great state of Texas. TXU stated these could be valuable in helping a customer make an informed decision about the marketplace. However, TXU did contend that making false statements should not be allowed.

Commission response

The commission concludes that the ARM suggestion is not necessary and that the proposed provision was clear. To the extent that Reliant is suggesting that provisions should be adopted relating to accurate marketing claims describing the history of a REP and its parent, it has not provided sufficient justification that it would be appropriate.

Subsection (c)(1)(A)(iii)

TXU noted that this section is written to apply to affiliate REPs which would only apply until the price to beat obligation has ended and, more importantly, that there is no reason that any REP should be allowed to falsely claim that receiving service from any REP will provide a customer with better service from the TDU. Reliant disagreed that there were no longer affiliated REPs as there are still some REPs who are affiliated with TDUs and the business relationship did not disappear with the ending of the price to beat. Reliant stated it was appropriate to maintain a specific provision in the rules as a REP affiliated with a TDU should always be prohibited from indicating that its affiliation will result in better service from the affiliated TDU.

Commission response

The commission agrees that no REP should be allowed to claim that receiving service from any REP will provide the customer better service from the TDU and amends the rule to eliminate the term "affiliate" and the reference to "affiliation."

Subsection (c)(1)(B)

ARM, TEAM, TXU, First Choice and Reliant argued that this proposal would lead to lengthy contracts that customers would be unlikely to read and additional costs that were unnecessary. TXU noted that this requirement might prevent REPs from citing to rule language, as the YRAC could potentially require the REP to cite 10 different commission rules requiring 23 additional pages of text. Therefore, TXU proposed that the REP be able to provide a summary of the cited laws. ARM disagreed and stated that any attempt to summarize provisions would be problematic. ARM proposed that the commission allow the REP to provide an internet link to the rule on the commission's website or other internet address that will provide the customer with the complete and current text of the rule, as providing a hard copy to the customer would waste paper and conflict with the 250 word limitation in subsection (c)(2)(A). Reliant proposed that the information could be provided upon request if the commission deemed the information necessary. First Choice agreed that providing a citation to the particular law or providing a rule summary should be adequate. OPC appreciated this requirement and proposed that the rule also require laws to be listed rather than just commission rules. In reply comments, OPC took note of the concerns and agreed that a reference to the commission's website where the rule can be found would be appropriate. OPC alternatively discussed that the REP could agree to provide a copy of the rule or law upon a customer's request.

Commission response

The commission agrees with ARM that any attempt to provide a summary of a commission rule could lead to potential problems. The commission has amended this provision to allow a REP to provide an internet address or link to the actual rule text.

Reliant opined that requiring REPs to include their certified name in advertisements, online and websites increases REP costs without an associated benefit to the market or consumer. Reliant noted that since the commission issues each REP a unique certification number, that providing that number on communication should provide the consumer enough information to identify the REP with the commission.

Commission response

The commission agrees with Reliant that including the certification number provides enough information for the customer to identify the REP and to find the certificated name if necessary.

Subsection (c)(1)(C)

ARM suggested deleting the first sentence of subsection (c)(1)(C), as the REP's obligation to provide the TOS, EFL and YRAC to a customer after enrollment is already comprehensively covered in §25.474. Also, ARM proposed to delete the reference to small commercial customers as it believes that the rule should only apply to residential customers. Reliant cautioned that this should be considered in light of the determination on applicability but, regardless, the obligation to provide an EFL when a material change is made should be limited to residential and small commercial customers.

Commission response

The commission sees no harm in including the obligation to provide the TOS, EFL and YRAC to a customer in this rule, in addition to §25.474. Consistent with its discussion in question 6, the commission concludes that this rule should apply to small commercial customers but makes some requirements applicable only to residential customers or contracts.

TXU argued that a customer should not be allowed to request unlimited free copies of the TOS, YRAC and EFL as this could be expensive for the REP and suggested the rule parallel §25.479, which allows a customer to have copies once in a 12-month period at no charge. OPC recommended that additional copies be made available for a small fee and/or REPs should not be required to provide copies upon a customer's request if the documents are available on an accessible website. Reliant saw minimal value in charging customers for the documents, particularly given the probability that the situation will arise infrequently and recommended TXU's proposed change not be accepted.

Commission response

The commission agrees with Reliant that there is minimal value in charging customers for the documents and makes no changes to the rule.

Subsection (c)(1)(D)

ARM, First Choice and Reliant noted that REPs are currently required to retain a copy of each version of the TOS, EFL and YRAC for two years. The benefits of requiring a REP to keep the documents for four years is far outweighed by the additional costs and burdens that REPs will bear to comply with the expanded document retention requirement, and ARM, First Choice and Reliant contended that the two year document retention period in the current rule is sufficient. ARM also proposed to delete the reference to when the "contract period ends" as the starting point for the retention period. A more appropriate reference point would be the date upon which any such document is no longer in effect for any customer.

Commission response

The commission notes that the statute of limitations for contract disputes is four years and concludes that the REPs should be required to keep the documentation until the statute of limitations expires.

Subsection (c)(1)(E)

ARM and Reliant argued that the proposed requirement in subsection (c)(1)(E) to retain the methodology to calculate the average price is unnecessary given that §25.471(b)(1)(A) already mandates that a REP retain records sufficient to verify compliance with the requirements of any applicable rules. They proposed deleting this subsection. Reliant noted that in order for the calculation to be verified for small commercial products, the commission must establish a load profile for the small commercial customers.

Commission response

Since the commission has changed the rule to eliminate the requirement to calculate a price average over the course of a year, the requirement to keep these records is unnecessary. The commission agrees with Reliant that a load factor is necessary to calculate the small commercial customer average price, and amends the pricing disclosure on the EFL accordingly.

Subsection (c)(1)(F)

ARM and TEAM stated that the filing of non-residential contracts raises confidentiality issues since terms of those contracts are often confidential. ARM and Reliant recommended deletion of the requirement to file quarterly copies of the TOS and EFL for each retail electric product as it is burdensome and unnecessary. ARM stated that the customer may obtain the documents upon request, the general public can get it on the commission's Electric Choice website and the commission has access to such documents today pursuant to the current rule which requires a REP to furnish a copy of the TOS to the commission upon request. ARM recommended restating the current rule requirements. Reliant recommended stating that the TOS and EFL are subject to review by the commission and shall be furnished to the commission or its staff upon request. TXU recommended that the purpose could be met and unnecessary burden avoided if the rule were limited to plans currently being offered to new customers and plans that, even if they are not being offered to new customers, have changed since the previous filing of the TOS and EFL for those plans. First Choice stated that the variable product would be determined by a proprietary formula and should not be publicly disclosed.

Reliant proposed a new subsection to clarify that all documents and notices provided pursuant to this section be e-mailed to customers unless the specific requirements provide otherwise.

Commission response

The commission agrees with ARM and TEAM that the contracts do not need to be filed but should be available to the commission upon request.

Subsection (c)(2)(A)

ARM proposed to eliminate the 250 word paragraph limit as ARM felt it was arbitrary. ARM and Reliant also proposed to delete the requirement to include the text of referenced laws. Texas ROSE/TLSC fully supported this provision and added that the materials should be in a font no smaller than 10 point and that the phrase "unless otherwise permitted by the commission" be deleted.

Commission response

The commission does not agree to eliminate the 250 word paragraph limit. The commission sees a need to have contracts that customers can understand, and it is difficult for customers to find important terms buried in lengthy paragraphs. The commission is permitting the text of laws and rules to be provided through a web address. The commission agrees with Texas ROSE/TLSC that there is no reason that contract documents should be in a font smaller than 10 point and changes the rule accordingly.

Subsection (c)(2)(B)

ARM, First Choice, Reliant and TXU suggested subsection (c)(2)(B) be deleted given that §25.473 already addresses requirements regarding the availability and provision of contract documents in English and Spanish. Reliant is concerned that this section could be interpreted to mean that documents must be provided in English and Spanish to every customer rather than in the preferred language the customer requested at enrollment.

Commission response

The commission agrees that §25.473 of this title (relating to Non-English Language Requirements), adequately covers this requirement and, in an effort to alleviate potential confusion, removes it from this rule.

Subsection (c)(2)(C)

ARM suggested re-wording subsection (c)(2)(C) to clarify the intent. TXU suggested clarifying that this provision refers to the power to choose website rather than the commission's website. Texas ROSE/TLSC and OPC supported a requirement for all REPS to post documents on the commission website, as it gives the commission an opportunity to review the documents and provides a more comprehensive tool to customers who use the Internet as a primary resource for investigating their options and gaining access to information from providers and would help make the market more transparent to everyone. OPC argued that the only REPS who do not post materials to the power to choose website are ones that are trying to fly under the radar and operate out of a post office box and the Greensheet. ARM responded that what OPC and Texas ROSE fail to understand is that the current postings on the power to choose reflect only a portion of the residential retail electric product offerings available in the market today and this would create administrative difficul-

ties for the commission to administer and would strain the REP as well. ARM noted that it would be problematic to mandate non-residential REPs to post their products on the commission sponsored website given that many are customized and contain competitively sensitive information that cannot be publicly disclosed.

Commission response

The commission agrees that it would be easier to monitor REPs if all offers were posted on the commission's power to choose website but declines to accept Texas ROSE/TLSC and OPCs suggestion that all REPs be required to post offers on the website. The commission recognizes that there are legitimate reasons why some REPs do not wish to be listed on the commission's Power to Choose website, such as a desire to grow slowly in order to avoid high collateral requests from suppliers and ERCOT. The commission is not mandating that all providers post their offers on the site. The commission is adopting a modification to make it clear that the web site that the rule refers to is its customer education web site, www.powertochoose.com.

Subsection (c)(2)(D)

ARM proposed that subsection (c)(2)(D) be revised to permit a REP to assess an early termination fee for the termination of service resulting from a customer's relocation. Reliant and Cities did not support the proposal to introduce an increased burden on consumers to provide evidence that they have relocated. Reliant also proposed to clarify that the exemption from charges co-incident to relocation is limited to termination penalties imposed by REPs, and does not apply to fees charged by the TDU, such as a move-out charge. Cities were concerned that the proposed rule language caused contracts to be terminated early for a customer who provided early notification and Cities provided suggested language to address it.

Commission response

Consistent with the discussion in response to question 1, the commission is amending the rule to permit a REP to require customers to provide evidence of the relocation and a forwarding address. It is also adopting the clarification suggested by Reliant that this provision is intended to relieve the customer from paying an early termination penalty. The commission also deletes the sentence that addressed when the contract terminates. The commission understands that the contract terminates only if the customer notifies the REP that the customer will no longer occupy the premise and upon the TDU's performance of a move-out transaction.

Subsection (c)(2)(E)

TEAM stated that the implementation of the proposed rule would stifle market creativity, as REPs would no longer have the freedom to create new and innovative products that are responsive to the needs and desires of customers, but would be limited to four narrowly-defined pricing buckets and would lead to mislabeled products and confusion in the marketplace. TEAM stated that many products would fall into the variable bucket by default if they could be offered at all, the unintended consequence of which would be that disparate product offerings would be labeled the same. TEAM requested that the proposed pricing buckets be permissive and not mandatory, where REPs could use the pricing buckets as models, having the freedom to design products in response to requests but without the stifling requirement that every product fit within one of the four limited pricing buckets.

ARM and Green Mountain did not support the mandatory classification of all retail electric products into one of the four specified products types. Green Mountain urged the commission to adopt an approach that improves disclosures related to products that customers are signing up for today and that is flexible enough to foster and allow innovation and enhanced customer choices and benefits that will come with new products features and plans. An officially-sanctioned regulatory system fosters a misleading impression that there are only four types of products available in the market and may cause customers to overlook the other disclosures and assume that all products in the category are the same and therefore the price would be the only thing left to compare.

Direct Energy commented that keeping the current definitions of "fixed" and "variable" was appropriate. Tara noted that under this draft a REP is prohibited from describing components of the rate as fixed unless it fixes all components. Texas ROSE/TLSC preferred only two categories, fixed and variable, as dividing products into further categories would be a distinction without differences for most customers.

Reliant stated that the proposed product definitions are too complex and could lead to customer confusion and restrict innovation of products that might not fit squarely into one of the definitions. Direct Energy pointed out that this section requires a contract to be for only one type of product, and there are products under contract in the market that have the characteristics of more than one product type. For example, a fixed price product may convert to a variable product upon the end of the fixed price term. Direct Energy argued that the commission should allow a REP to continue offering innovative products by permitting a contract to identify more than one product type.

TEAM feared that the pricing buckets could stifle high tech product development with advanced metering, as products have ability to offer cost savings to the customer but would fall into the variable pricing bucket. Public Utility Brokers responded that while it agrees that there could be product innovations from advanced metering they will have nothing to do with the demand for fixed or variable products and allowing uncertainty in to the meaning of common sense terms will compound confusion and turn advanced metering into another tool that can be used to confuse customers.

Commission response

The commission disagrees with TEAM that having categories of products will stifle creativity in the market. The commission believes it is important for customers to understand the type of product they are purchasing. The commission believes the best way to achieve this desired outcome is to have categories for different types of products and descriptors that provide information that customers will find helpful in evaluating plans they are purchasing. Additionally, the commission believes it is necessary to define each type of product so that REPs have a uniform classification system for products. One of the ways that customers are expected to use these terms is to screen products, so that they can focus on the type of product that they believe is appropriate for them, and having clear definitions for a small number of contract types should improve the usefulness of EFLs in performing this screening function.

The commission concludes that three categories are appropriate: fixed rate, indexed and variable. Although the commission agrees that some predictable products will fit into the variable category, it believes that it will be helpful for the customer to re-

alize that the prices for products they purchase may vary over the life of the contract. This is not always negative and the details of the product can be more fully explained by the REP in the EFL and TOS.

Reliant opined that the proposed language could be subject to interpretation as to whether the contract would specify the product name or the product type. Reliant assumed it meant that the product type should be provided and proposed changes in accordance with that.

Commission response

The commission has modified this provision to make it clear that the EFL must disclose the product type.

Gateway recommended that the TOS and YRAC are documents that could include various types of products within them, since having several different documents becomes difficult to maintain.

Commission response

The commission agrees that a REP can use the same TOS and YRAC documents for multiple products but does not believe the rule requires an amendment to clarify this point.

Subsection (c)(2)(F)

Reliant and ARM requested that the rule track PURA §17.008(e) in its entirety. Texas ROSE/TLSC expressed concern about permitting REPs to use a credit score, credit history or utility payment data as a basis for determining price in a contract that exceeds 12 months. They argued that electricity is an essential service and customers with low-income and poor payment histories should not be subjected to arbitrarily high prices because of their credit situation. Therefore, Texas ROSE/TLSC recommended the commission establish a maximum contract period of 12 months in place of a minimum contract period of six months. ARM disagreed with the proposed changes as this unnecessarily restricts availability of retail offerings to customers similar to the product categories set in the proposed rule.

Commission response

The commission notes that this section of the rule is based on PURA §17.008(e) and agrees with Reliant that the rule should track PURA §17.008(e) in its entirety and makes the change to the rule. The commission does not make the changes suggested by Texas ROSE/TLSC but believes that the rule should reflect the legislative policy, which permits the use of these credit assessment tools for longer-term plans.

Subsection (c)(2)(G)

ARM and Reliant argued that subsection (c)(2)(G) elevates one element of contract law above another depending on the nature of the dispute. ARM suggested instead that the rule state that any dispute is subject to rules of contract interpretation. Tara agreed and stated that language is unfairly prejudicial to the REP in the case where contracts are negotiated with small business customers who may have aggregators, brokers or other experts negotiating on their behalf. Tara opined that it is aggregators, not REPs, who should be primarily responsible, because often ambiguities are introduced into the contract because an aggregator has insisted on problematic language.

Commission response

The commission disagrees with ARM, Reliant and Tara that this language is unfairly prejudicial to the REP. Contracts for residential and possibly many small commercial customers have little or no room for the customer to negotiate or change the contract. Therefore, since the REP has unilateral control over the contract, any ambiguity should be construed in favor of the customer.

Subsection (c)(2)(H)

Tara stated that subsection (c)(2)(H) was unnecessary as REPs are already required to comply with contracts. Cities strongly supported this statement being in the rule. Cities suggested adding a clarification noting that failure to do so is adequate grounds for a customer to file a complaint with the commission. Cities noted that one REP has asserted that violations of the contract (in this instance, charges inconsistent with the contract) are contract disputes that must be left to the courts to adjudicate. Cities noted that in individual complaint cases the commission has already expressly repudiated that position and expressed the view that the commission may resolve disputes involving a REP's non-compliance with its contract with the customer. ARM opined that Cities' proposed language bootstraps the commission with the jurisdiction and authority over customer complaints about contracts for retail service. ARM opposed the addition of Cities' language, arguing that it is meaningless as a matter of law, given that PURA and not the commission's rules is the source for the agency's jurisdiction and authority over such complaints.

Commission response

The commission concludes that requiring a REP to comply with its contracts is consistent with its authority under PURA §17.004. This section provides that customers are entitled to "protection from fraudulent, unfair, misleading [or] deceptive practices," and authorizes the commission to adopt and enforce rules that are necessary and appropriate to carry out the section. Section 25.485 of this title (relating to Customer Access and Complaint Handling) permits customers to file complaints against a REP or aggregator, and the commission concludes that it is not necessary to repeat this right in this rule. Accordingly, it is retaining the requirement that a REP comply with its contracts but is not including the right to file a complaint in this rule.

Subsection (c)(2)(I)

ARM and Reliant proposed the addition of a new subsection that addresses the means by which the REP may provide any written notice to the customer that is required under the proposed rule to provide flexibility such as inserting a note on the customer's bill, including a separate note with the customer's bill, or providing a notice in an envelope separate from the bill or in an e-mail if the customer has agreed to receive any such notices at a designated e-mail address. OPC stated that it is not clear how this proposal would be compatible with subsection (e), as this timeline might not correspond with the customer's billing cycle. If the commission does accept the new language, then OPC urged the REP provide notice for two billing cycles prior to the change.

Commission response

The commission has detailed the types of notices allowed, where notice is required, in other provisions of the rule. A general provision on notice to customers, as in Reliant and ARM's suggestion, is more likely to confuse than clarify the rule. The commission notes that §25.471(d)(7) of this title defines "in writing" to include an electronic transmission of written words. Therefore, the commission clarifies that unless stated otherwise, "written notice" can be sent electronically.

Subsection (c)(3)(A)

TXU opined that subsections (c)(3)(A) and (B) appear to impose the same appropriate requirements upon guaranteed fixed and limited fixed price plans and suggested combining these sections to avoid redundancy and the possibility of conflicting interpretation arising from the slightly different language. Direct Energy proposed that this subsection be revised to clarify that the prohibition only applies to the fixed price commitment period.

Commission response

The commission substantially modifies subsection (c)(3) consistent with changes made to subsection (e).

First Choice commented that the variable price product should not have a term that exceeds 31 days in duration, as a variable price product by its very nature is unpredictable. Tara argued that the prohibitions in section (c) preclude REPs from offering lower prices in exchange for lower risks. Tara commented that REPs have to build catastrophic events such as hurricanes and spikes in gas prices into their contracts because they are not able to seek permission from the customer to modify terms, which means the consumer will either pay a higher cost on a day-to-day basis or sign up with a REP with a lower offer and be dumped to the POLR at an even higher cost if the risk becomes reality. Tara stated that the proposed rule would result in fewer products available to customers, as it will force customers into products that are intended to provide more certainty at a higher price or that offer lower initial prices with a greater risk to a REPs business if catastrophic costs are not priced at inception.

Commission response

The commission agrees that the rule should require all variable contracts for residential customers to have a term of 31 days or less. The commission does not agree with Tara's assertions that subsection (c) prohibits REPs from offering lower prices in exchange for lower risks.

Subsection (c)(3)(B) and (C)

Reliant proposed to delete subsection (c)(3)(B), consistent with its proposed deletion of the limited fixed price product. TXU argued that the differences in REPs' ability to effectuate a price change in connection with an indexed plan versus a variable price plan warrant the notice periods for each plan to be treated differently; indexed plans should not require 45-day notice, because any price changes to an indexed plan would be due to changes in the values of the publicly available elements that are inputted into a pre-defined pricing formula. Consequently, at all times during the billing cycle the customer has the ability to calculate the price for electricity, in stark contrast to customers on a variable price plan, where price changes are due to a "method" whose elements are controlled and known only by the REP. Accordingly, TXU suggested dividing this category into two subsections. Cities stated that "pricing methodology" was not relevant to guaranteed fixed price or limited fixed price contracts (where only TDU and TRE or other pass-through charges are permitted to change) and requested that it be removed from these sections.

ARM commented that given the nature of variable price and index price products, the 45-day notice requirement for material changes is not required for a price change for a variable or indexed product as long as the EFL has disclosed to the customer how and when the price may change and, to the extent there is confusion about whether price and pricing methodology are the same, ARM offered clarifying language. Reliant proposed to add language that would clarify that products with contract periods longer than 31 days would be covered by this section but contracts with periods of 31 days or shorter would require affirmative consent to change the length of the contract. It also proposed to allow a 45-day notice to be used to change a price or the pricing methodology when the contract is month-to-month. Direct Energy disagreed with this proposal, opposing a notice requirement. TXU agreed that indexed prices should not require a price change notice but proposed a clarification to ensure that this section does not inadvertently authorize a REP to extend a customer's contract through the use of 45-days notice. OPC stated that if a REP has the latitude to change the price at will, then the REP should either provide 45-days notice to allow the customer to shop for a different product or the REP should disclose to the customer at the time of registration the maximum amount the price may increase on a monthly basis as well as the maximum price increase over the life of the contract. Cities argued and OPC agreed that it should not be permissible to change the length of the contract in a month-to-month contract as it puts the customer at risk for being bound to a REP for a particular term when the customer believed that he was on a month-to-month product. They noted that a customer might have selected the REP's offering because it was a month-to-month product, especially given that the customer might not have received or understood what the proposed change means for his electric service. ARM disagreed with OPC's proposal and argued that the material change notice requirement should not apply to a price change for a variable product that is consistent with the product's EFL. ARM stated that price changes for a variable price product should not be restricted unless the REP and customer voluntarily agree to restrictions and their agreement is reflected in the contract for retail electric service.

Commission response

The commission concludes that three products are appropriate: fixed rate, indexed and variable price. The commission determines that specific EFL disclosures are required for the indexed and variable price products to alert the customer that the price can change. The commission requires price history for residential variable price products. The commission requires residential variable price products to be only month-to-month and prohibits termination fees on month-to-month contracts. The commission requires the bill to provide residential customers with instructions for how to obtain information about the price that will apply on the next bill for variable price products. With all these requirements, the commission does not believe it is necessary to require a notice of a price change where the product documents disclose that the price may change and how it may change. These requirements represent a balance between the latitude that is appropriate to foster the development of new products by REPs and the need for customer tools in assessing these products, such as simple product descriptions that can be used on EFLs and the commission's customer education web site and the need for current price information for customers on variable price products.

Subsection (c)(3)(D)

Texas Rose/TLSC supported the proposed subsection (c)(3)(D) and would ultimately support a rule that would prohibit the charging of early termination fees, to permit consumers to freely switch REPs when more favorable prices and terms become available. ARM stated that it is fully supportive of the customer's ability to switch REPs in the exercise of customer choice, but terminating service with a REP prior to the end of the contract term has financial implications for the REP and, therefore, REPs should

continue to be allowed to include early termination fees in their contracts as a means of protecting themselves financially.

Gateway opposed the language relating to using an estimated end date as the basis for charging an early termination fee. Gateway stated that all early termination fees should be based on actual end dates. For example, a REP may make a good faith estimate of a start date of October 1, 2008 and an end date of September 30, 2009 respectively. Due to a processing problem at the TDU the actual start date and end date are December 1, 2008 and November 30, 2009 respectively. According to the way the rule is written, if a customer cancelled on October 1, 2009, the customer would incur no early termination fee even though the REPs contract was through November 30, 2009. This puts the REP at an additional risk of exposure to changing market prices.

Commission response

The commission disagrees with Gateway that early termination fees should be based solely on actual end dates. When customers sign contracts for other products or services it is clear when the contract begins and when the contract ends. In the case of retail electric service, both the starting date of the contract and the end date have not been known to the customer in many instances. Coupled with the fact that it might currently take 45 days to switch to another provider at the end of a term, customers end up confused and frustrated and may either be afraid to switch providers for fear of a termination penalty, or be stuck with a large termination penalty because they couldn't time the switch precisely. The commission does understand the need for termination penalties especially under a long term contract when the REP has purchased supply for the customer. However, as the contract draws to a close, this risk becomes less because the period for which the REP has purchased supply or otherwise hedged the obligation to supply the customer is shorter. In addition, it appears that REPs do not hedge 100% of their customer obligations, for a variety of reasons. The commission believes that the customer should not bear the responsibility for uncertainty about the termination date that arises from action of the REP in providing an estimated date that is not the actual end date or the TDU in executing a switch or meter read earlier or later than expected. The commission concludes that a customer's obligation to pay a termination fee should end 14 days prior to the contract end date provided by the REP. The commission concludes that the customer should have a short grace period prior to the termination date that the REP has communicated to the customer in which to switch without penalty. Recognizing that the REP is likely to have made supply or hedging arrangements to supply the customer that may be frustrated if the customer switches to another supplier early, the commission is adopting a rule with this shorter grace period.

Subsection (c)(4)(A)

ARM and Reliant suggested this subsection (c)(4)(A) be deleted given that §25.473 already addresses requirements regarding call center agents being able to communicate with customers in English and Spanish and any other language used to advertise to the customer.

Commission response

The commission agrees with Reliant and ARM that this is already covered in §25.473 and amends the rule accordingly.

Subsection (c)(4)(B)

ARM proposed to delete the reference to commercial customers in subsection (c)(4)(B), arguing that the rule should only apply to residential customers. It also argued that this provision should be revised to reflect that the REP is not required to post EFLs for electric products that are customized for a small commercial customer, if the commission determines the rule should apply to commercial customers. Reliant commented that there are other types of service where customer eligibility may need to be determined especially as meter technology continues to advance and that REPs should have the ability to ask if the customer has an advanced meter. TXU requested that a customer's street address should be required so that the REP can determine which TDU serves the customer or whether a customer is a new or existing customer of the REP. ARM did not oppose TXU's suggestions to allow input of other information by the customer but that urged that entering the address should be optional rather than mandatory.

Commission response

The commission agrees with ARM that subsection (c)(4) should exclude commercial customers. The commission disagrees with TXU that a customer should be required to enter its address. It is important that customers, especially residential customers, be able to shop anonymously for electric service, and therefore addresses should not be required. REPs may ask questions to tailor specific products for the customer if the customer voluntarily offers the information, but the questions should not require the customer to enter personal information such as name, address or telephone number to get information on a REP's products. The commission clarifies that this requirement is for residential customers.

Subsection (d)

TXU, Reliant, ARM and Direct Energy proposed that if a REP's phone number and/or Internet address are included on an advertisement, then these should not be required in the disclaimer statement. ARM commented that this subsection should apply only to residential customers or, if the commission applies the rule to both residential and small commercial customers, it should specifically state "small commercial" customers.

OPC proposed that inquiries from advertisements should be directed to the power to choose website rather than to individual REPs. ARM disagreed with this proposal.

Commission response

The commission agrees that if the information is included in the advertisement it need not be repeated in the disclosure statement. Subsection (a) of the rule makes this section applicable to small commercial customers whose load is less than one MW. It concludes that it is appropriate for the advertising provisions to have the same applicability. Marketing and advertising claims would still be subject to the general provisions of PURA that prohibit misleading practices.

Subsection (d)(1)

ARM, Reliant and Direct Energy proposed that REPs be required to provide only an EFL, rather than all contract documents, in response to an inquiry from a customer that responds to an advertisement.

Commission response

Information other than an EFL may be required for a customer to fully evaluate a REP's service offering, because the EFL is typically a high-level summary description of the contract. There-

fore, the commission modifies the provision to require a REP, upon request, to provide the commission with contract documents and other information used to substantiate comparisons in the advertisement.

Subsection (d)(2)

Reliant proposed that REPs provide information that would substantiate comparisons made in advertisements to the commission or staff upon request, rather than provide the substantiation to the public.

Commission response

The commission agrees with Reliant and changes the rule accordingly.

Subsection (d)(3)

ARM, Reliant, Direct Energy and First Choice shared the view that it would be impractical in the context of billboards to require that a REP's certificate number be included on outdoor advertising. These commenters suggested that REPs provide either a phone number and/or an internet address. First Choice pointed out that requiring this level of detail could pose a safety hazard. ARM proposed to delete the requirement that a REP's certified name be included on outdoor advertising.

Commission response

The commission believes that outdoor advertising should contain the REP's certified name and REP number and that they should be readable at audience level. These are important items the customer needs to research the claim made in the advertising.

ARM commented that the meaning of the term "material change" as currently used in §25.475(e) and in the proposed subsection (e) is so vague and ambiguous that it is not reasonable to expect REPs to uniformly interpret and apply the term. ARM recommended that subsection (e) be revised to specify that the term "material change" includes price changes, changes in pricing methodology, changes in contract term and changes in early cancellation fees. Reliant proposed changes to subsection (e) to align the section with Reliant's proposed definition of fixed and variable price products. Texas ROSE/TLSC proposed that this section require REPs to provide notice of price changes in excess of 5% in any given month to customers with variable price contracts. If the price can change without notice, then this must be clearly conveyed to the customer and not hidden in a paragraph of the TOS. Texas ROSE/TLSC opined that the language in the proposed rule allows a REP to permit a customer to waive the materiality of a price change in the terms of the contract, and they recommended that this provision be deleted. At a minimum, they stated that the rule should require that the first sentence of any contract that includes a waiver of notice of price change should begin with the following sentence in all capital letters and a 12 point font, "Under this contract the price you are charged for electricity may increase and (insert name of REP) will not provide you notice of the increase." In addition, they argued that this waiver should be included in any recordings or documentation of a customer's switch.

TXU and ARM suggested that a subsection be added to require that material change notices advise the customers that it may take 45 days for the customer to switch providers and noted that it was consistent with subsection (f)(2)(D), which requires the notice for renewal notices. Reliant agreed with the proposed change. OPC proposed to delete the variable product from subsection (e), as a REP should provide 45-day notice prior to changing the price of a variable rate product when a range of possible price changes are not stated on the EFL. ARM opposed these changes consistent with their discussion in questions 4 and 5.

Texas ROSE/TLSC argued that price is always material and urged the commission to uphold this principle in this rule.

Commission response

The commission believes there should be no change in the pricing commitments or term length during a contract term of a fixed product. The commission restructures this subsection consistent with the changes it is making to the various product types. The commission is not adopting a price threshold like the one that TLSC/Texas Rose proposed. Any price change must be consistent with the description of the product that was provided to the customer on enrollment. The purpose of these changes is to ensure that customers get the benefit of their bargain when they enroll for a product.

Subsection (e)(1)(A)

ARM urged the commission to provide greater clarity as to how a material change must be identified in the REP's material change notice to a customer. ARM proposed to delete the specific ways the written notice is provided and instead clarify that a customer is entitled to a full 45 days to terminate the contract without penalty if the customer finds the change unacceptable.

Commission response

The commission disagrees with ARM's proposed ways to notify the customer. The rule is specific in the ways that notice can be provided and the commission finds those methods acceptable and declines to amend the rule as suggested by ARM.

Subsection (e)(1)(B)

ARM proposed to add a definition of "conspicuously." Reliant disagreed with this proposed change, as it could place an unneeded restriction on REPs and the commission's "clear and conspicuous" requirement is adequate.

Commission response

The commission does not believe that a definition of "conspicuously" is necessary.

Subsection (e)(1)(C)

ARM proposed to add specificity to this subsection (e)(1)(C) to require the specific provisions in the contract that address the material change.

Commission response

The commission has substantially reduced the scope of the provision on contract changes, and the provision addressed by ARM has been deleted.

Subsection (e)(1)(D)

ARM proposed that the material change notice point out whether the customer may be subject to an early termination penalty and if so, the amount of the penalty. Reliant noted that the proposed section presents the customer with two choices when presented with material changes: accept the change or terminate the contract. Reliant stated that there could be other choices such as the customer could call the REP to find another product. Therefore, Reliant suggested altering this section to delete the reference to termination of the contract. ARM proposed to collapse subsec-

tions (e)(1)(D) and (e)(1)(E) and to note that the customer has the full 45 days to enroll in another product offered by the REP, to switch to another REP or to take other actions prior to the implementation of the material change.

Commission response

The commission modifies the required notice to specifically inform customers that it can take up to ten days to switch providers. The customer may be free to sign up on another product with the REP, and the REP is not prohibited from providing information on other plans in the notice.

Subsection (e)(1)(E)

First Choice stated that there were several instances where 45-day notices are better than 60 because 60 days may be too early and customers may forget to take action, 60 days is beyond the 45-day switch period so the expiration of the customer's price plan will not be coordinated with the switch away request and may expose the customer to termination penalties, and setting the price 60 days in advance may not give customers the full benefit of getting the lowest offers due to REPs being unable to make attractive offers this far in advance.

Commission response

The commission makes the notice period 14 days which should help address the concerns of First Choice.

In subsection (e)(2) Gexa proposed to succinctly state under what conditions a REP is not required to send notice to the customer, namely, for a change that benefits the customer or a pricing change that reflects charges resulting from the action of a federal, state, or local governmental or quasi-governmental entity. Reliant also suggested a clarification in subsection (e)(2).

Commission response The commission has modified this subsection to make it clear that notice is not required for a change that benefits the customer and to clarify the other circumstances in which a notice is required, consistent with Reliant and Gexa's suggestions.

Subsection (e)(3)

OPC proposed a new subsection (e)(3) stating that notice shall be required for changes to services provided by the REP such as bill payment methods, bonus or reward programs or special offers. ARM disagreed with OPC that a rewards program is material and argued that OPC confuses the concept of notice with the concept of material change notice and asked that OPC's change not be adopted.

Commission response

The commission agrees with OPC that rewards programs and affinity miles may be important to customers. Therefore, the commission agrees to allow changes in terms and conditions of term contracts that may include these programs, but requires the REP to send notice that would allow the customer the right to terminate a term contract if the changes are not acceptable to the customer.

Subsection (f)

TXU suggested that subsection (f) be revised to clarify that it does not apply to contracts that automatically renew. ARM commented that the term "written" should be included in the prefatory language to describe the notice of termination consistent with subsection (f)(2). Reliant provided modifications to require the expiration notice unless an automatic renewal provides that the customer's price will stay the same or the customer has affirmatively accepted a contract for service at the end of its contract.

Commission response

The commission concludes that when the initial term of a term contract expires, the REP should provide notice of the expiration of the contract, so that the customer has the opportunity to consider other options, even if the price would not change through the default renewal month-to-month contract presented to the customer in the notice of contract expiration.

ARM disagreed with the 60-day notice requirement for contract expiration, arguing that 45 days notice would be sufficient for this purpose. TEAM stated that the reminder notice is unnecessary and predicted that this particular proposal could become operationally burdensome because identifying a window for every contracted customer is difficult and likely to require a manual process and will require constant mailings from REPs in turn requiring constant manpower and outpouring of costs. TEAM also argued that the commission should not be in a position of deciding the appropriate window for notifying a customer of their potential to negotiate a new term, for example, a customer who has a five-year contract might want six months notice, while a customer on a three-month contract would be getting the prescribed notice in about the middle of their contract. Reliant proposed that notice be sent at least 45 days but no more than 60 days prior to the end of contract expiration rather than 60-75 days in advance. ARM agreed in reply comments.

ARM argued that written notice should not be required when the customer's retail electric service is automatically renewed or extended upon reaching the end of an initial term and that the customer may wrongly believe that retail electric service is ending upon the end of the initial term. Reliant stated that it is unclear whether a contract with an automatic renewal clause would be subject to the requirement to issue a contract expiration notice.

Texas ROSE/TLSC supported the requirement that REPs send customers a notice of contract expirations and stated that many customers have contacted the commission asking for this provision. Texas ROSE/TLSC stated that expecting customers to remember when their contract expires is unrealistic if not impossible, given that the proposed rule would allow REPs to give an estimate of the contract end date. Customers should be able to protect themselves from changes in price and service by having a reasonable window of opportunity before their contract terminates to switch without a penalty as the proposed rule allows. Customers who are not given any renewal offers should not be punished by having to transition to month-to-month service before being able to switch without penalty.

First Choice asked the commission to consider the convenience and benefits customers would garner by permitting a procedure whereby the contract would automatically renew without affirmative consent. First Choice also requested clarification of whether the TOS must state a renewal price, or whether the TOS can incorporate by reference a default product type, current price of that product and a statement that the "then current" market pricing will be used to price the default service, as market conditions will not allow REPs to define a specific price that will apply to a future automatic renewal.

Ben Ray of Ben M. Ray Investments stated that he was a consumer who had been exploited by the application of exorbitant electric rates without notification upon the end of a contract and urged the commission to take action to prevent the continuation

of these acts as his situation has left him with very little confidence in the integrity of the REPs.

TEAM argued that requiring a contract expiration notice in addition to the information already provided to the customer in the enrollment process is excessive. TEAM argued that the customer signed a contract and thus knows the terms of that contract specifically when service started and when service ends. TEAM further argued that the notice should not be mandatory because this is a service which REPs can use to differentiate themselves in the market. OPC disagreed with the assumption that people will remember the date they enrolled in a particular electric service product. Public Utility Brokers stated that REPs having trouble predicting the end date of a contract could state the date as "the next meter read after X". Public Utility Brokers suggested putting this statement on each invoice.

Representative Zerwas asked that the commission provide an explanation of how a switch can occur without the customer incurring termination penalties. Representative Zerwas had a constituent with a postgraduate education who could not figure out how to time a switch of providers to transition smoothly from one provider to another. Representative Zerwas also requested the REPs be required to provide immediate feedback to new customers or applicants informing the customer of the anticipated date of the switch, any fees associated with the switch and confirming the rates and termination date of the contract. Representative Jackson asked the commission to consider mandating that REPs notify customers at least 30 days from the date the contract is set to expire.

M.E. and Lois Campbell stated that customers need to know when their contract is up so that they can re-negotiate a fair contract. Robin Parr stated that there should be notice of rate increase and a way to call and agree or some other way to accept a contract other than disconnection when a contract is expiring.

Commission response

The commission and legislators have heard many complaints about contract expiration and automatic renewal provisions. The commission's proposal was a response to the many negative experiences and harm to customers resulting from REP practices under current rules. The commission's objective in the proposed rule and in adopting the rule is to establish minimum standards for notifying customers of the termination of their contract, so that they can shop for a new contract with the same or a different REP. One of the problems with the existing practices is that customers have been exposed to termination fees for switching to a different REP prior to the expiration of the original contract, but they have had difficulties in determining when the original contract expires. The bottom line is that the existing rules and REP practices under the rules have resulted in significant customer dissatisfaction and the belief by some that the commission has not met its obligation to protect customers from unfair and misleading practices. In adopting this rule, the commission seeks to improve REPs' performance with respect to contract expiration issues by establishing minimum standards.

The proposed rule included three features to improve customers' treatment with respect to the completion of a contract term. These contract completion features are: (1) the requirement that the REP provide notice to the customers of the expiration of a contract; (2) the prohibition against collecting an early termination fee during the 60 days following this notice; and (3) proration. The commission modifies the second requirement to provide a 14-day grace period at the end of contract term in which the customer can be switched without penalty. The commission eliminates the proration requirement in favor of the 14-day grace period.

Customers have the right to be informed when a contract is expiring. It is important for the customer to know what the rate will be and what EFL the customer will be served under if the customer takes no action. Even if the customer was provided the information upon enrollment, the customer may have misplaced it and it should be provided again so that the customer has resources available to make an informed decision. Therefore, the commission determines that the renewal notice should be sent 14 days prior but no more than 45 days in advance of a contract renewal.

Subsection (f)(1)(A)

ARM proposed to eliminate the requirement of a prominent message on the outside of the envelope.

Commission response

The commission retains this requirement, in order to alert the customer to the importance of the notice and also permits an alternative method of compliance, under which the REP must provide the approximate date or billing cycle and month that the existing contract will expire on the last three bills rendered prior to the expiration of the contract.

Subsection (f)(1)(B)

ARM proposed that subsection (f)(1)(B) be modified to allow the REP to alternatively provide the month or billing cycle in which the contract will expire rather than an approximate date, to permit the REP to use the same template for a letter, bill message or e-mail message that is sent as part of a batch communications to customers whose contracts for retail electric service are expiring in the same month.

Commission response

The commission agrees that a REP could provide the billing cycle and month rather than the estimated day for contract expiration. That would allow the customer to notify its potential new REP of the billing cycle and month, which would likely be the only information needed by the new REP.

Subsection (f)(1)(C)

ARM and TEAM noted that proposed subsection (f)(1)(C) requires the written notice of a contract expiration to include a statement that no termination penalty shall apply for a 60-day period from the date the notice is sent to the customer. In essence, ARM and TEAM stated, the proposed subsection gives the customer permission to terminate the contract during the last two months of the contract term without penalty. The elimination is at odds with proposed subsection (f)(4) which requires a proration if the customer terminates service during a specified period in the contract term. ARM, opposed both of these ideas, as the notice of contract expiration pursuant to proposed subsection (f) should not encourage customers to terminate service prior to the end of the contract period. As drafted, subsection (f)(1)(C) modifies the term of the contract and the amount of the termination fee. Upon signing up a customer, a REP must presume that the customer will take service from it for the duration of the contract period, and an early termination will undermine that. As a result, a REP that procured power entered into hedging arrangements based on the presumption that the customer will take service through the end of the contract term stands to be harmed and the REP cannot mitigate the financial consequences it faces when early

termination occurs. Additionally, ARM stated that termination of service prior to the expiration of a contract is not necessary for purposes of timing a switch to another REP. ARM argued that a customer can enter into a contract for future retail electric service from another REP during the time it is taking such service from its current REP and therefore there is no need to terminate an existing service contract prior to the end of the contract term. Therefore, ARM concluded that the contract penalty should apply in full unless otherwise provided for in the contract and this subsection should be deleted from the rule.

TEAM, TXU, Green Mountain and Reliant opposed the proration proposal. Reliant stated that this provision is contrary to PURA §39.001(d) in that it is not "limited so as to impose the least impact on competition." TXU stated that the termination penalty serves two purposes: to help protect the REP against costs associated with procuring power to serve the contract and to help fend off other REP's attempts to lure customers away prior to the end of the contract term. TXU also argued that some REPs already prorate early termination penalties providing a competitive solution to the perceived problem. TEAM requested clarification to ensure that REPs are not exposed to the costs of losing a customer for whom power is already purchased. OPC did not find any of these arguments persuasive, as a REP is constantly adding new customers and losing customers and its customer base is never fixed at a particular number of customers for a significant period of time. Therefore, a REP's purchasing strategy must account for fluctuations in customer base, and allowing a customer to pay a reduced fee proportionate to the time left on his contract would not harm the REP. Texas ROSE/TLSC preferred that early termination penalties be prohibited but supported the concept of proration, because a customer's liability for paying an early termination fee should decrease as the customer's length of service with the REP increases.

Reliant stated that this provision would materially change the contract and that the commission's intent was to have this apply to the new contract that goes into effect rather than the contract that is expiring and should be moved to subsection (f)(2).

ARM did not support increasing the period of time in which an early termination penalty does not apply if the customer terminates service from 45 to 60 days. This allows the termination penalty to not apply even if the customer takes action after the 45 days and it would increase the burden to the REPs who already have systems programmed to 45 days. TXU and ARM suggested that the customer be advised of whether a termination penalty applies since the customer may not remember. Reliant opposed that suggestion as it felt the concept was covered in that the customer is told that no termination penalty shall apply for 60 days and the proposal to change it to state whether a penalty applies appears to conflict.

TXU proposed changes to conform to its comments that customers who are not subject to a termination penalty receive notice of that fact.

Texas ROSE/TLSC stated that the main purpose of giving customers this notice is to inform them that they may be subject to a price change when their term contract is expiring and given that switches normally take 45 days to become effective, requiring 60 days notice is reasonable as this essentially gives the customer a 10-12 day window to submit a switch request assuming the customer receives the notice in 3-5 calendar days. A 45-day notice period would result in many, if not most, customers getting caught in a month-to-month trap.

ARM contended that subsection (f)(2) should be revised to clarify that the customer has the full 45 days to take action to either accept any renewal offer or decline and switch to another provider.

Reliant suggested modification to the number of days from 60 to 15 and to begin counting the 15 days from when the new contract terms go into effect, Reliant contended that this was equivalent to the proposed 60-day prohibition because 45 days will have passed before any new terms go into effect and the prohibition on a termination penalty should not apply if the customer affirmatively consents to enroll in a new product. ARM did not agree and stated that regardless of whether the prohibition against the application of an early termination fee aims to incent a customer with an expiring contract to act or to serve as an antidote to buyer's remorse, it should not be adopted.

Commission response

The proposals relating to proration and the prohibition of collecting an early termination fee prior to the expiration of a contract were intended to improve customers' treatment relating to the completion of a contract term. The commission believes that prorating the fee has merit, because the REP's costs of obtaining supply for a customer or hedging a customer contract should be roughly correlated to the length of the contract. Thus, as the contract nears its agreed termination, the REP's benefit from buying power for or hedging its contract with the customer has, for the most part, been realized. However, the commission concludes that proration and the prohibition against the collection of an early termination fee in the last 14 days of a contract term serve the same purpose, and the commission is not adopting the proration proposal. The commission is adopting, with a modification, the prohibition against the collection of an early termination fee. The purpose of this measure is to give the customer a period prior to the expiration of a contract to shop for a new energy plan to replace the one that is expiring, without the threat of a termination fee if the transfer to another REP occurs prior to the expiration of the contract. The 14-day period is based on providing the customer a grace period in recognition of the fact that the exact meter read date is unknown.

The commission also modifies the time period for sending the contract expiration notice to be 14-45 days in advance of the contract expiration.

The commission does not agree with Reliant's proposed change. As discussed above, the commission concludes that the customer should have time to shop and switch providers following receipt of the notice, without incurring a termination fee in the last 14 days of their contract since it is unclear when a switch would be completed.

Robin Parr stated that she was unsure that disconnecting service because a customer does not sign a new contract is a good practice. Reliant was opposed to the disconnection of customers at the end of a contract period as it would not be good for the competitive market to have commission rules that allow REPs to disconnect customers at contract expiration simply because the customer does not take affirmative action. Reliant cited PURA §39.101 which states that customers have a right to choose their retail electric provider and to have that choice honored and that the customer's chosen provider will not be changed without the customer's informed consent. There are many reasons the customer might not have received the contract expiration notice, such as, postal service delivery issue or military service, and it is not appropriate to penalize customers who are paying their bills. Reliant did not believe that customers generally expect that their

service can be disconnected because they do not take affirmative action. This is not what happens with phone or cable service. OPC, Cities and Texas ROSE/TLSC were also opposed. ARM opposed both of these modifications on the grounds that neither mandatory disconnection nor mandatory non-disconnection is the preferable option. Both options are extremes and the REP should have the option to take the appropriate action when the customer's contract expires. Cities were not comfortable with the prospect of a customer being charged a high rate on a variable month-to-month contract but preferred customers being switched to a variable rate to avoid disconnection of service upon contract expiration as long as the customer is able to cancel the service at any time with no cancellation penalties.

Commission response

The commission agrees with Reliant and Robin Parr that disconnection is not appropriate for a customer who is paying the bill. Therefore, the commission determines that in the contract expiration notice, the REP should inform the customer that if the customer fails to take action, they will be placed on a month-to-month plan with no termination penalties. The notice should include the TOS (if different from the customer's current TOS) and EFL associated with the product that will apply if the customer takes no action.

Subsection (f)(3)

Direct Energy supported the allowance of products that provide for an initial term with a fixed price, followed by a transition to a post-initial term month-to-month variable product with no cancellation fee if the customer agreed at the time of initial enrollment. ARM and Direct Energy proposed revisions to this section consistent with its belief that no additional written notices of contract expiration or renewal should be required. In the event that the commission does adopt a written notice requirement, ARM requested that the written notice be provided to the customer in the final month of the initial term of the contract and should state that the contract term is ending but that the customer's service will automatically renew or extend upon the end of the term. The written notice should be allowed to be a bill notice or email as proposed by ARM and if the contract terms were disclosed to the customer at enrollment during the initial term, the REP should only need to inform the customer that the fixed price term is ending in the billing cycle and that the variable price arrangement as agreed to at the time of initial enrollment would begin. OPC disagreed with ARM and noted that notice of contract expiration in subsection (f) requires separate written notice, and OPC was pleased with the requirement.

Commission response

The commission disagrees with Direct Energy and ARM that no additional notice would be required, because the commission believes it is important at the end of a term, when the contract is expiring, that the customer be given notice and opportunity to switch. The customer may not remember for the terms of a product that was contracted for six months or even years before. The customer deserves the opportunity to be reminded of the expiration and to take action at that time.

Direct Energy stated that if a customer enrolls in a product that includes a fixed price for the first 12 months and on month 13 reverts to a month-to-month variable product with the same price as the fixed rate for the first month then there should be no additional notice required by the REP, and if the commission does believe notice should be required it should be allowed to be provided on the bill or with the bill during the last month of the contract.

Commission response

The commission does not believe a line item on the last bill is enough notice, and that the customer needs to have sufficient information to decide whether to shop for a new service plan and to evaluate the terms of the next portion of the contract, even if under the default renewal product, the price is the same. Market conditions may have changed so that plans that are more favorable to the customer are available, and the customer should have notice and opportunity to switch products or providers.

Reliant stated the term "permitted by this section" was vague, and it could not be expected to comply with such a vague and open ended provision. Reliant suggested deleting the provision and instead referring to subsection (g)(7).

Commission response

The commission has eliminated the automatic renewal concept and has replaced it with required contract expiration notice.

Subsection (f)(5)

Reliant proposed to delete this subsection (f)(5), because it is redundant and it is impossible to determine a start date until the customer signs and returns the agreement.

Commission response

The commission disagrees with Reliant that the REP will not be able to state the start date. For a re-enrollment, the REP should be able to use the date that the original contract ends as the start date of the new contract. The commission makes no changes to the rule in response to Reliant's argument.

TEAM proposed that the letter of authorization be replaced with "written consent form" because the letter of authorization connotes the enrollment process described in §25.474. ARM proposed revisions to this subsection. ARM commented that this proposed subsection employs the concepts of enroll and re-enroll. It is unclear whether the proposed rule intends to distinguish the two concepts.

The commission agrees with TEAM that the letter of authorization can be replaced with "written consent form." When a customer initially enrolls with a REP under the provisions of §25.474, that is the initial enrollment. If a customer enrolls in any product with the same REP after that initial enrollment, the re-enrollment procedures provided in subsection (e)(2) of the rule as adopted may be followed. The commission does not agree with ARM's conclusion that the provision is unclear because it uses both "enrollment" and "re-enrollment."

Subsection (f)(5)(E)

ARM noted there is some risk to provide a precise enroll or re-enrollment date in the event the utility does not read the customer's meter as scheduled.

The commission agrees that the REP may not know the exact date the customer will be re-enrolled due to TDU meter reading schedules, and the commission amends the rule to allow for an estimated re-enrollment date.

Subsection (f)(5)(G)

ARM suggested the language regarding customer account access is not germane to the situation where the customer is already enrolled with the REP.

Commission response

The commission agrees and deletes subsection (f)(5)(G).

Subsection (g)(1)

Direct Energy proposed making subsections (g)(1), (h)(1) and (i)(7) consistent and recommended including certification number as part of subsection (g)(1). Texas ROSE/TLSC asked that if a customer is required to have a certain type of equipment for the plan, then it should be specified in the terms of service. ARM did not oppose the suggestion and proposed language to accommodate the suggestion.

Commission response

The commission agrees with the proposal of Texas ROSE/TLSC and has made the changes suggested by Direct Energy.

Subsection (g)(2)(A)

Reliant, First Choice and Gateway opposed the requirement in subsection (g)(2)(A). Reliant interpreted this to require notice of the specific dollar amount a TDU might charge in performing a move-in or switch, and stated that it isn't practical and REPs do not have control over when such charges change. Because a customer can choose among various options, it would be impossible to include a specific dollar figure. Instead, the rule should allow a REP to describe the potential charges that a TDU might assess for these services. Gateway stated that the problem lies within a REP's ability to maintain an all encompassing database of TDU fees. Gateway recommended that a provision be added to refer customers to their TDU website or contract their TDU for any non-recurring charges that may be imposed by the TDU and billed by the REP. OPC disagreed and stated that the TOS should be a complete description of the agreement between the customer and the REP, in contrast to the EFL which should provide customers a full description of the main components of the agreement in an easily understood format.

Commission response

Recognizing that the charges in question may originate from the TDU, and may change over time, the commission modifies the terms of service requirements to allow REPs to describe the non-recurring charges.

Subsection (g)(2)(C)

In connection with subsection (g)(2(C), Reliant argued that termination penalties are limited to specific products and that subsection (g)(4)(B) provides customers with sufficient notice that the termination penalty may apply and disclosure of the level of the termination penalty should occur in the EFL, pursuant to proposed subsection (h)(4). ARM agreed and stated the revision should also identify the non-recurring charges as those over which the REP has no control and which may be charged by the REP.

Commission response

The commission agrees with Reliant that termination penalties are addressed in published subsection (g)(4)(B), which is subsection (f)(4(B) of the rule as adopted, and need not also be disclosed in the pricing and payment arrangement requirements for the TOS. The commission does not agree with the suggestion from ARM. The charges in question may originate from the TDU, but it is within the REP's discretion whether, when, and how to pass these charges through to their customers.

Subsection (g)(2)(E)

Texas ROSE/TLSC stated that low-income energy efficiency programs that the REP provides should be included in the TOS.

Commission response

The commission agrees with Texas ROSE/TLSC and makes changes to the TOS contents to include low income energy efficiency programs.

Subsection (g)(4)(C)

Reliant proposed changes consistent with its opposition to requiring customers to submit evidence of relocation. Gateway proposed changes consistent with its view that the contract terminates if the customer moves outside an area served by the REP or out of the state of Texas.

Commission response

The commission does not agree with Gateway that the contract terminates only if the customer moves to an area the REP does not serve. The commission finds that even if the customer moves next door, it may have different electric needs at the new premises; for example, it may move to a home with an advanced meter and wish to take advantage of a demand response program the current REP does not offer, or it may move to a house from an apartment. In these circumstances, the customer should not be limited by a contract for a residence or commercial space that may have very different electric needs. This section does not require a REP to demand proof that a customer is moving, but it permits a REP to do so, and requires notice if the REP does require it.

Subsection (g)(5)

Reliant proposed revisions to subsection (g)(5) consistent with the prohibition on discrimination in §25.471 and PURA §39.101(c) and §17.004(a)(4).

Commission response

The commission is not adopting this recommendation.

Subsection (g)(7)

Reliant stated its understanding that penalties as described in the proposed subsection would include any fee that the REP might charge a customer who decides to stop taking service from the REP and the commission should clarify whether administrative or other fees that could be charged at the end of a customer relationship would be considered termination penalties. Reliant also proposed to strike the term renewal pricing because it is not clear what would be required above the EFL.

Commission response

Fees charged to a customer at the end of the customer relationship or at the end of a contract are considered termination penalties and are addressed in published subsection (g)(4)(B) and need not be addressed elsewhere in the TOS requirements.

ARM stated that the requirements in subsection (g)(7) are problematic for several reasons. First, references to "the price during the renewal term" or "the month-to-month renewal price" are not consistent with the possibility that REPs will offer variable price or index price products in the automatic renewal period. The references to price fail to take into account the possibility there may be no single price for a retail product subject to variable pricing or indexed pricing, given the possibility of changes in price for such products. If the term price is used in the context of an average price, the computation would be impossible because the REP cannot gauge how long the customer will take service on

a month-to-month basis. At best, the REP would only be able to presume that the customer will take such service for at least one month which is at odds with the concept of calculating an average price. ARM contended that unless the REP committed to charge a non-variable price product in the automatic renewal it would be difficult for the REP at the time of initial enrollment to disclose a specific price for month-to-month product subject to variable or indexed pricing. Consequently at the time of initial enrollment if the REP cannot disclose the price with certainty it should disclose this information prior to the end of the contract term in accordance with the proposal in (f)(3) which is less than 30 days prior to the end of the contract term. OPC understands ARM's concern and suggested that at the time the contract is entered into, an example of the renewal product be provided rather than a specific price and that should have limits as to how much the contract could change and a limit on a monthly basis.

Commission response

The commission agrees with ARM that average price should not be used in the EFL for these products and has amended subsection (h)(2) (now (g)(2)) to describe the price disclosures for a variable product and indexed product to be included on the EFL.

Subsection (g)(7)

EPC recommended that this section clarify that this rule does not apply to month-to-month variable price products that are otherwise compliant with the newly proposed regulations.

Commission response

The commission will clarify that this provision, relating to contract expiration, applies to term contracts.

Subsection (h)(1)

Reliant opposed the inclusion of the REP's certified name and contact information in the EFL, arguing that the certificate number is sufficient to identify a REP and that contact information is available in the TOS document.

Commission response

The commission disagrees with Reliant that the REPs certified name and contact information should not be included on the EFL. Many customers have only an EFL when comparing offers and they need to know the REP's contact information and it should be included all documentation for easy reference for the customer.

Subsection (h)(2)

Gateway Power commented that, particularly in the case of variable price products, the listing of the average price per kilowatt-hour for various usage levels required under the proposed rule may be misleading to customers, and recommended that the average price levels be removed from the Electricity Facts Label (EFL). TEAM opposed the requirement that the EFL include the average price per kilowatt hour for various usage levels. According to TEAM, the price for limited-fixed and variable price products vary based on factors that are beyond the control of the REP, such as TDU charges, ancillary service charges, and unaccounted for energy charges. As such, TEAM argued that the prices shown in the EFL would be only rough estimates that could be misleading to customers. TEAM recommended that, instead of estimated average prices, additional questions and answers should be added to the EFL, including: 1) What components of my price can change without notice?, and, 2) Are there any limits to how much the price can change without notice?

Commission response

The commission agrees with Gateway and TEAM that the EFL should not include average prices for variable price products with a term longer than one month. The "average rate" should be the charge that will apply on the first bill and changes the rule accordingly.

OPC made two specific recommendations regarding the EFL. First, OPC stated that the language of §25.475(h)(2)(E) regarding promotional rates was too permissive, and that REPs should be required to list promotional rates below the average rate by changing the word "may" in the third sentence of the paragraph to "shall." Second, OPC is concerned that permitting REPs to include other fees in the TOS document could be misleading to customers, and argued that the phrase "a full listing of fees" should be deleted from the "Other Key Terms and Questions" section of the EFL. In addition, OPC recommended that the phrase "or give direct location in TOS" be deleted from the answer to the question "What other fees may I be charged?" in the "Disclosure Chart" section of the EFL, and that examples of such other fees be listed in the EFL template. OPC preferred charges to be itemized rather than bundled into the overall price per kWh.

Commission response

The commission will remove the promotional language provision from the EFL section consistent with its determination that the EFL for a variable price product will contain the price that will apply on the first bill only, which may or may not be a promotional rate. However, the EFL must provide information on how the price can change from the rate listed. Non-recurring fees are required to be either described or itemized in the TOS document and described in the EFL.

Reliant proposed changes to subsection (h)(2) to conform this subsection to proposals it made concerning the definitions of fixed and variable priced services, and additionally questioned whether 2,500 kilowatt hours was a reasonable usage level for residential customers since using the commission's load profile a 2,500 kW customer in Oncor's territory for August would be profiled to use 3,535 kW. Instead, Reliant proposed that the 2,500 kilowatt usage level be replaced with a 2,000 kilowatt hour usage level and that an additional usage level of 1,000 kilowatt hours be added to the "Electricity Price" section of the EFL. Reliant argued that, because the REP is required to estimate the average per-kilowatt hour price, the work "estimated" should be inserted before the phrase "price for each specified kWh usage over the term of the contract" in §25.475(h)(2)(E). Reliant also proposed that the last sentence of that subsection be deleted or clarified, as Reliant believes that it could be read to impose a cap for variable price products. TXU proposed that two additional usage tiers be added to the EFL, at 1,000 kWh and 2,000 kWh, arguing that the additional information would better enable customers to judge the average cost of electricity at their particular usage level. In reply comments, Reliant and ARM opposed TXU's proposal to increase the number of usage tiers shown on the EFL. Reliant argued that there is not sufficient space on the EFL to show five usage tiers, and that a usage level of 2,500 kWh is not representative for most customers.

Like OPC, Reliant proposed that the term "may" should be changed to "shall" in the sentence regarding the listing of promotional rates. Reliant suggested that the fee disclosures required by subsection (h)(3)(B) be limited to fees that are assessed by the REP, excluding fees that may be assessed by

the TDU. Regarding the renewable energy disclosures required by subsection (h)(5), Reliant proposed that the rules regarding calculation of renewable energy disclosures should be included in this subsection rather than in §25.476, and proposed corresponding changes to that rule.

Commission response

The commission agrees with Reliant that 2,500 should be replaced with 2,000 and agrees with TXU that 1,000 should be reinstated.

Consistent with its position that the mandatory product categories in the proposed rule should not be adopted, ARM proposed that these categories be deleted from the EFL. ARM stated that the calculation of an average price over the term of the contract for variable price products is difficult if not impossible to perform, and ultimately could be misleading to customers, because the price may vary according to factors that cannot be predicted by the REP. ARM proposed instead that for variable price products, the price shown in the EFL should be the price that will be in effect for the first month of the contract, together with a notification to the customer of how and when the price may change during the term of the contract. Consistent with its position that the disclosure requirements of the proposed rule should be limited to residential customers, ARM proposed that references to small commercial customers be deleted from subsection (h)(2) and from the EFL. CPL Retail Energy, Direct Energy, and WTU Retail Energy concurred with the comments of ARM regarding subsection (h) of the proposed rule. Reliant opposed ARM's proposal that, for variable price products, the price for the first month's bill be shown, arguing that the price for a given product may change during the time period of up to 45 days that it may take to accomplish a switch. As an alternative, Reliant proposed that the EFL show the price currently in effect for the product, and that the EFL disclose the frequency of price changes, any limitation on the amount of price increases, and information regarding how the customer can obtain the current price.

Commission response

The commission agrees that the average price calculation is difficult and has replaced this with Reliant's suggestion to show the price for the current month for a variable product. However, the commission disagrees with Reliant that the price the customer receives during the first month of service should be the variable price in effect at the time of the customer switch. In order to avoid questions about false advertising and customer misunderstandings, the commission determines that the EFL for a variable product should contain a statement that this is the price that will be applied during the first billing cycle, that the price may change, and information on where to locate the historical prices for the product.

Green Mountain opposed the four categories of pricing plans in the proposed rule, and suggested that the EFL should simply contain a clear description of the characteristics of the product's pricing plan, including whether the prices shown in the EFL are for a period of time or as of one point in time, whether the prices are subject to change, if the prices are not subject to change, over what time period they will not change and whether there are any exceptions that might permit prices to change, if the prices are subject to change, a description of any factors that may result in such a change, whether and how customers will be notified of any price change, whether any change in price is subject to a formula or whether it is discretionary on the part of the REP, and what prices will apply upon expiration of the contract.

Commission response

The commission disagrees with Green Mountain that the categories of pricing should be removed from the EFL. As discussed above, the categories should help customers who are shopping focus on the kinds of service plans they prefer.

Green Mountain also opposes the elimination of the fuel mix and emissions information from the EFL. In reply comments, Reliant responded to Green Mountain's position opposing the elimination of fuel mix and emissions data by arguing that the underlying calculations do not produce reliable results and that performing the calculations annually is costly to REPs. Gateway also supported removing the fuel mix and emissions disclosures from the EFL. Texas ROSE and TLSC opposed the removal of information regarding fuel sources from the EFL, arguing that Texas is the number one state for carbon dioxide emissions, and is among the top five producers of nitrogen oxides, sulfur oxides, and mercury and this information is important for consumers in making a choice among electricity providers. Environmental Defense Fund and Public Citizen also opposed the elimination of information regarding fuel sources from the EFL.

Commission response

The commission agrees with Green Mountain and EDF that customers care about fuel mix and how electricity is produced. The commission also agrees with Reliant that the underlying calculations for the fuel mix calculations do not produce accurate results and therefore do not present accurate information to the customer. Unless the customer has purchased a renewable product, it is not likely that the fuel mix portion of the EFL will look different from any other product, as most REPs default to the "system mix" which is the average for the state of Texas, because they are not able to verify the origin of electricity purchased for their customers. Because of the uncertainty of the inputs, the commission agrees not to include the emissions and waste information on the EFL but will include the renewable content. Additionally, the commission eliminates subsection (k) as the commission agrees with Reliant that a separate document containing the emissions and waste information is not necessary.

Subsection (h)(3)

Texas ROSE/TLSC recommended that the disclosure of fees required by subsection (h)(3) be limited to fees assessed by the REP, that are not fees passed through from the TDU to the customer. Texas ROSE and TLSC proposed that additional information be included in the EFL to inform customers as to the viability of the REP and the potential volatility of prices for that REP, including the percentage of power purchased on the spot market, how deposits and prepayments are held, the number of years the REP has been in business, and complete disclosure of all fees that may be charged in the EFL.

Commission response

The commission agrees with Texas ROSE/TLSC regarding fees in proposed subsection (h)(3) (subsection (g)(3)(B) of the adopted rule) being limited to fees assessed by the REP. The commission does not agree with Texas ROSE/TLSC regarding including information on the EFL to include spot market purchases, how deposits and prepayments are held and the number of years the REP has been in business. The REP's practice with respect to the percentage of power purchased on the spot market may vary, so that it would be difficult for a REP

to include the information accurately on the EFL. The way in which deposits and prepayments are held are prescribed by §25.107 of this title (relating to Certification of Retail Electric Providers (REPs)), and there is no need to restate that on the EFL. Finally, the number of years a REP has been in business may be a criterion that the REP will urge customers to consider in making choices of a retail provider, but the commission does not believe that it is so important that it should be a mandatory disclosure on the EFL. The commission declines to make those changes.

Subsection (h)(4)

Representative Zerwas asked the commission to consider requiring REPs to provide information to prospective switching customers regarding standard switch dates, fees for an out-of-cycle switch and the ability to select a standard switch and switch providers without additional fees.

Commission response

The commission has opened a separate proceeding to expedite the switching process, without charge to the customer, and is adopting a requirement that REPs provide customers a notice of the termination of the contract from 14 to 45 days prior to the termination of a contract. Information about the contract expiration notice will also be required in the TOS. This expedited switching process, if adopted, and the notice of contract expiration should permit customers to avoid or minimize their exposure to surprise terms in a default renewal contract. The commission expects that these changes will address Representative Zerwas's concerns.

Gexa Energy contended that the format of the EFL should not be mandated by the proposed rule, but that the required contents of the EFL be strictly defined by requiring that a table be included in the EFL that lists each charge that may appear on the customer's bill, the entity responsible for setting the charge, the current amount of each charge, the unit of measure for which the charge is applicable, and whether the charge is fixed, variable, or indexed. In reply comments, CPL, Direct Energy, and WTU opposed Gexa's proposal to disaggregate the components of the customer's bill, arguing that the customer is interested in the total price paid for electric service, and that Gexa's proposed disaggregation would impose unnecessary administrative costs on REPs.

Commission response

The commission believes that for customers to make apples to apples comparisons between products the format of the EFL should be identical between REPs and does not make changes in response to Gexa's suggestion. Changing how price is displayed would also require educating customers to the new format and is likely to engender confusion.

TXU recommended that the phrase "using the commission-approved load profile" be deleted from subsection (h)(2)(B)(i), arguing that the resulting figure has been confusing to customers that do not understand that the price is an average over a 12-month period, and that, with the increasing adoption of smart meters and granular time-of-day pricing, load profiles will no longer be necessary. Instead, TXU stated that the REP should simply calculate the price at each of the assumed usage levels based on the prices contained in the terms of service. TXU noted that many rate plans for small business customers include demand charges, and proposed that the disclosures required in subsection (h)(2)(B)(ii) assume a demand of 20 kW. TXU proposed that the last sentence of subsection (h)(2)(C)(ii) be moved to a new subsection (h)(2)(C)(iii), to clarify that its terms are applicable both to products sold separately and products sold as part of a bundle. Finally, TXU noted that the requirements relating to promotional rates currently are included only in subsection (h)(2)(E), relating to variable price and indexed products, but also should be included in subsection (h)(2)(D), relating to fixed price products. ARM concurred with TXU's objections to the use of load profiles in calculating average prices.

Commission response

The commission agrees that the use of the load profile is no longer necessary and removes this requirement from the rule.

M.E. and Lois Campbell stated that customers need to pay fair prices for electricity with no surprises.

Commission response

The commission agrees and intends for the disclosures in the EFL to make the products clearer to customers.

Subsection (i)

First Choice Power and Reliant proposed to clarify that the right of rescission applies only to new customers who have switched REPs and does not apply to move in transactions. OPC suggested the YRAC document cover the energy efficiency programs run by the transmission providers. Texas ROSE and TLSC agreed. Texas ROSE and TSLC proposed that the YRAC cover any energy efficiency programs sponsored by the REP.

Reliant Energy suggested removing contact information, including mailing address, Internet address, toll-free telephone number and hours of operation from the YRAC. Reliant stated that contact information is available on the TOS and the need for duplication has not been demonstrated. Additionally, Reliant suggested using the REP certification number instead of the REP's certified name, as the REP certification number is an efficient method of identification a REP.

Texas ROSE and TLSC suggested that the YRAC include information on financial and energy assistance programs for residential customers. ARM did not oppose the YRAC changes proposed by Texas ROSE and TLSC. The only caveat that ARM proposed is that the information requirement be met through the use of "toll-free numbers, website addresses or other reasonable means in the YRAC."

Commission response

The commission has added financial and energy assistance topics to the YRAC. The commission also concludes that basic REP identification information should be included in the TOS and YRAC. These are meant to be documents that a customer may retain during the term of a contract and may need to consult to get answers to questions about the contract, so the information should be on both documents.

Direct Energy proposed to delete subsection (i)(6)(D) since the same basic information is covered in subsection (g)(4)(A)(i). Direct Energy argued that subsection (g)(4)(A)(i) specifies that the rescission applies to switch requests while subsection (i)(6)(D) uses "new customer" that could be construed to cover move-in customers.

Commission response

The commission agrees with Direct Energy that this section should be deleted and amends the rule accordingly.

Subsection (j)

As noted in the discussion of question 2, ARM, TEAM, ConocoPhilips, TIEC, Tara, TXU, Reliant, Gateway and First Choice did not support the proposed waiver in subsection (j). Texas ROSE and TLSC supported the waiver.

Commission response

For reasons addressed in question 2 the commission removes proposed subsection (j) from the rule.

Section 25.475(k) and §25.476 Fuel Mix and Emissions Disclosure

EDF opposed the deletion of emissions and fuel mix disclosure from the EFL and relegating it to a new, separate document. EDF insisted that the provisions related to the statutory requirement on environmental impact disclosure currently in force. Quoting a NREL review, EDF insisted that Texas customers are equally concerned about the price of their power and how it is produced and likened the EFL to the nutrition label on food products. EDF disagreed with Reliant's suggestion to eliminate the requirement to provide fuel mix and emissions information to customers, even as part of a separate document that would be available only upon request and argued that the current EFL disclosure minimizes the administrative burdens imposed on REPs in developing product-specific disclosures.

Texas ROSE/TLSC agreed with EDF that Texas consumers are interested in the environmental impact of their electricity choices and argued that fuel mix is an important component not only of emissions but of price and price stability. Texas ROSE/TLSC favored retaining fuel mix and emission disclosures in the EFL to enable customers to consider these factors in their purchasing decisions without having to do additional research.

Green Mountain concurred with EDF that the EFL fuel mix and emissions disclosure content and format be kept the same. It maintained that the current EFL provides a valuable education benefit regardless of whether customers are interested in renewable energy or environmental issues and therefore should not be modified or moved to an optional disclosure document available only upon request. If the commission did not agree to keep the fuel mix disclosures on the EFL as they are today, Green Mountain suggested an alternative approach that would give REPs that offer an electricity product with an unspecified or unauthenticated fuel mix the option to either provide an EFL that complies with the EFL fuel mix and emission disclosure requirements under the existing rule or provide an EFL with an abbreviated generic fuel mix and emissions disclosure that states that the fuel mix for the product is unspecified, provides information about the Texas average fuel mix, and provides information about the emissions and waste associated with the generation of electricity using the state average fuel mix.

Reliant stated that removing the fuel mix and emissions disclosure from the EFL does not solve the problem as it would not address the fact that the underlying calculations do not produce accurate, product-specific information. Reliant stressed that this effect is a result of a number of factors, including the fact that the data is usually that of an entire generation company's portfolio rather than unit-specific data. Reliant argued that REPs often rely on the statewide average because they buy from third parties and the actual source of the generation cannot be verified. Reliant recommended that the fuel mix and emissions disclosures be removed altogether. It stated that creating a fuel mix and emissions disclosure as a separate document from the EFL and available on demand would create even more burden on REPs and increase costs without providing accurate data and would therefore bring little value to the customer. Reliant proposed that all information in §25.476 related to calculating the renewable energy and fuel mix and emissions disclosure be removed and only the statewide average renewable energy produced be calculated. If the disclosures are kept, Reliant requested clarification that the yearly fuel mix and emissions disclosure is to be used for products introduced in the applicable year and REPs are not required to include the revised data into documents for existing products that are no longer available to new customers, but under which customers continue to be served.

OPC stated that the comments of Green Mountain, EDF and Public Citizen, and Texas ROSE regarding the fuel mix and emissions disclosure were persuasive and recommended that the fuel mix and emission disclosure be included in the EFL in some way.

Direct Energy recommended that subsection (f)(8) be deleted, as it refers to affiliated REPs' disclosures for price to beat products, which are no longer applicable in the market.

Commission response

The commission agrees with Green Mountain and EDF that customers care about fuel mix and how electricity is produced. The commission also agrees with Reliant that the underlying calculations for the fuel mix calculations do not produce accurate results and therefore do not present accurate information to the customer. Unless the customer has purchased a renewable product, it is not likely that fuel mix portion of the EFL will look different from any other product, as most REPs default to the "system mix" or average for the state of Texas, because they are not able to verify where the electricity purchased for their customers originates. Given the fact that the system mix is not really meaningful, the commission agrees not to include the emissions and waste information on the EFL. The rule will require disclosure of the renewable content of a product and the system average renewable content. Additionally, the commission eliminates subsection (k) as the commission agrees with Reliant that a separate document containing the emissions and waste information is not necessary.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

16 TAC §25.475

This repeal is adopted under the Public Utility Regulatory Act (PURA), §14.002 which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, PURA §39.101(a)(5) which entitles a customer to be protected from discrimination on the basis of race, color, sex, nationality, religion, or marital status; PURA §39.101(b)(5) which entitles a customer to receive sufficient information to make an informed choice of provider; PURA §39.101(b)(6) which entitles a customer to be protected from unfair, misleading, or deceptive practices.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, 17.004(a)(1), 39.101(a)(5), 39.101(b)(5), 39.101(b)(6).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2009.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: August 29, 2008
For further information, please call: (512) 936-7223

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16 TAC §25.475

This new section is adopted under the Public Utility Regulatory Act (PURA), §14.002 which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, PURA §39.101(a)(5) which entitles a customer to be protected from discrimination on the basis of race, color, sex, nationality, religion, or marital status; PURA §39.101(b)(5) which entitles a customer to receive sufficient information to make an informed choice of provider; PURA §39.101(b)(6) which entitles a customer to be protected from unfair, misleading, or deceptive practices.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, 17.004(a)(1), 39.101(a)(5), 39.101(b)(5), 39.101(b)(6).

§25.475. General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers.

(a) Applicability. The requirements of this section apply to retail electric providers (REPs) and aggregators, when specifically stated, in connection with the provision of service and marketing to residential and small commercial customers. Not later than five months after the effective date of this section, REPs shall conform all electricity products and contract documents to the requirements of this section. If a term contract is in effect on the date that this section becomes effective, the REP is required only to provide the notice of expiration required by subsection (e) of this section beginning no later than five months from the effective date of this section if the contract is still in effect at that time and is not otherwise required to conform such contracts.

(b) Definitions. The following words and terms, when used in this section shall have the following meanings, unless the context indicates otherwise.

(1) Contract--The Terms of Service document (TOS), the Electricity Facts Label (EFL), Your Rights as a Customer document (YRAC), and the documentation of enrollment pursuant to §25.474 of this title (relating to Selection of Retail Electric Provider).

(2) Contract documents--The TOS, EFL and YRAC.

(3) Contract expiration--The time when the initial term contract is completed. A new contract is initiated when the customer begins receiving service pursuant to the new EFL.

(4) Contract term--The time period the contract is in effect.

(5) Fixed rate product--A retail electric product with a term of at least three months for which the price (including recurring charges) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in the Transmission and Distribution Utility (TDU) charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control.

(6) Indexed product--A retail electric product for which the price, including recurring charges, can vary according to a pre-defined pricing formula that is based on publicly available indices or information and is disclosed to the customer, and to reflect actual changes in TDU charges, changes to the ERCOT or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs on a REP that are beyond the REPs control. An indexed product may be for a term of three months or more, or may be a month-to-month contract.

(7) Month-to-month contract--A contract with a term of 31 days or less. A month-to-month contract may not contain a termination fee or penalty.

(8) Price--The cost for a retail electric product that includes all recurring charges excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax.

(9) Recurring charge--A charge for a retail electric product that is expected to appear on a customer's bill in every billing period or appear in three or more billing periods in a twelve month period. A charge is not considered recurring if it will be billed by the TDU and passed on to the customer and will either not be applied to all customers of that class within the TDU territory, or cannot be known until the customer enrolls or requests a specific service.

(10) Term contract--a contract with a term in excess of 31 days.

(11) Variable price product--A retail product for which price may vary according to a method determined by the REP, including a product for which the price, can increase no more than a defined percentage as indexed to the customer's previous billing month's price. For residential customers, a variable price product can be only a month-to-month contract.

(c) General Retail Electric Provider requirements.

(1) General Disclosure Requirements.

(A) All written, electronic, and oral communications, including advertising, websites, direct marketing materials, billing statements, TOSs, EFLs and YRACs distributed by a REP or aggregator shall be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Prohibited communications include, but are not limited to:

(i) Using the term or terms "fixed" to market a product that does not meet the definition of a fixed rate product.

(ii) Suggesting, implying, or otherwise leading someone to believe that a REP or aggregator has been providing retail electric service prior to the time the REP or aggregator was certified or registered by the commission.

(iii) Suggesting, implying or otherwise leading someone to believe that receiving retail electric service from a REP will provide a customer with better quality of service from the TDU.

(iv) Falsely suggesting, implying or otherwise leading someone to believe that a person is a representative of a TDU or any REP or aggregator.

(v) Falsely suggesting, implying or otherwise leading someone to believe that a contract has benefits for a period of time longer than the initial contract term.

(B) Written and electronic communications shall not refer to laws, including commission rules without providing a link or website address where the text of those rules are available. All printed advertisements, electronic advertising over the Internet, and websites, shall include the REP's certified name or commission authorized business name, or the aggregator's registered name, and the number of the certification or registration.

(C) The TOS, EFL, and YRAC shall be provided to each customer upon enrollment. Each document shall be provided to the customer whenever a change is made to the specific document and upon a customer's request, at any time free of charge.

(D) A REP shall retain a copy of each version of the TOS, EFL, and YRAC during the time the plan is in effect for a customer and for four years after the contract ceases to be in effect for any customer. REPs shall provide such documents at the request of the commission or its staff.

(2) General contracting requirements.

(A) A TOS, EFL, and YRAC shall be complete, shall be written in language that is clear, plain and easily understood, and shall be printed in paragraphs of no more than 250 words in a font no smaller than 10 point. References to laws including commission rules in these documents shall include a link or internet address to the full text of the law.

(B) All contract documents shall be available to the commission to post on its customer education website (if the REP chooses to post offers to the website).

(C) A contract is limited to service to a customer at a location specified in the contract. If the customer moves from the location, the customer is under no obligation to continue the contract at another location. The REP may require a customer to provide evidence that it is moving. There shall be no early termination fee assessed to the customer as a result of the customer's relocation if the customer provides a forwarding address and, if required, reasonable evidence that the customer no longer occupies the location specified in the contract.

(D) A TOS and EFL shall disclose the type of product being described, using one of the following terms: fixed rate product, indexed product or a variable price product.

(E) A REP shall not use a credit score, a credit history, or utility payment data as the basis for determining the price for electric service for a product with a contract term of 12 months or less for an existing residential customer or in response to an applicant's request to become a residential customer.

(F) In any dispute between a customer and a REP concerning the terms of a contract, any vagueness, obscurity, or ambiguity in the contract will be construed in favor of the customer.

(G) For a variable price product, the REP shall disclose on the REP's website and through a toll-free number the current price and, for residential customers, one year price history, or history for the life of the product, if it has been offered less than one year. A REP shall not rename a product in order to avoid disclosure of price history. The EFL of a variable price product or indexed product shall include a notice of how the current price and, if applicable, historical price information may be obtained.

(H) A REP shall comply with its contracts.

(3) Specific contract requirements.

(A) The contract term shall be conspicuously disclosed.

(B) The start and end dates of the contract shall be available to the customer upon request. The start and end dates may be estimated if the REP cannot determine these dates. After the start date is known, the end date may be estimated consistent with the TDU meter reading schedule for the customer during the month of expiration.

(4) Website requirements.

(A) Each REP that offers residential retail electric products for enrollment on its website shall prominently display the EFL for any products offered without a person having to enter any personal information other than zip code and information that allows determination of the type of offer the consumer wishes to review. Person-specific information shall not be required.

(B) The EFL for each product shall be printable in no more than a two page format. The EFL, TOS, and YRAC for any products offered for enrollment on the website shall be available for viewing or downloading.

(d) Changes in contract and price and notice of changes. A REP may make changes to the terms and conditions of a contract or to the price of a product as provided for in this section. Changes in term (length) of a contract require the customer to enter into a new contract and may not be made by providing the notice described in paragraph (3) of this subsection.

(1) Contract changes other than price.

(A) A REP may not change the price (other than as allowed by paragraph (2) of this subsection) or contract term of a term contract for a retail electric product, during its term; but may change any other provision of the contract, with notice under paragraph (3) of this subsection.

(B) A REP may not change the terms and conditions of a month-to-month product, indexed or variable price products, unless it provides notice under paragraph (3) of this subsection.

(2) Price changes.

(A) A REP may only change the price of a fixed rate product, an indexed product, or a variable product consistent with the definitions in this section and according to the product's EFL. Such price changes do not require notice under paragraph (3) of this subsection.

(B) Following an allowed price change to a fixed rate product, each bill issued for the remainder of the contract term shall either show the price changes on one or more separate line items, or shall include a conspicuous notice stating that the amount billed includes price changes allowed by rules of the Public Utility Commission.

(C) Each residential bill for a variable price product shall include a statement informing the customer how to obtain information about the price that will apply on the next bill.

(3) Notice of changes to terms and conditions. A REP must provide written notice to its customers at least 14 days in advance of the date that the change in the contract will be applied to the customer's bill or take effect. Notice is not required for a change that benefits the customer.

(4) Contents of the notice to change terms and conditions. The notice shall:

(A) be provided in or with the customer's bill or in a separate document;

(B) include the following statement, "Important notice regarding changes to your contract" clearly and conspicuously in the notice;

(C) identify the change and the specific contract provisions that address the change;

(D) clearly specify what actions the customer needs to take if the customer does not accept the proposed changes to the contract;

(E) state in bold lettering that if the new terms are not acceptable to the customer, the customer may terminate the contract and no termination penalty shall apply for 14 days from the date that the notice is sent to the customer but may apply if action is taken after the 14 days have expired. No such statement is required if the customer would not be subject to a termination penalty under any circumstances; and

(F) state in bold lettering that establishing service with another REP may take up to seven business days.

(e) Contract expiration and renewal offers. The REP shall send a written notice of contract expiration at least 14 days prior to the date of contract expiration but no more than 45 days in advance of expiration. Nothing in this section shall preclude a REP from offering a new contract to the customer at any other time during the contract term.

(1) Contract Expiration.

(A) If a customer takes no action in response to a notice of contract expiration for the continued receipt of retail electric service upon the contract's expiration, the REP shall serve the customer pursuant to a default renewal product that is a month-to-month product.

(B) Written notice of contract expiration shall be provided in or with the customer's bill, or in a separate document.

(i) If the notice is provided in or with the customer's bill, the REP must either:

(I) include a statement on the outside of the billing envelope that states, "Contract Expiration Notice;" or

(II) provide on the last three bills the approximate date or the billing cycle and month that the existing contract will expire. This notice shall be conspicuous (either by font or color) and in a location close to the "amount due." In this case the bill rendered 14-45 days before the contract expires shall contain the notice of contract expiration requirements in subparagraph (C) of this paragraph.

(ii) If notice is provided in a separate document, a statement shall be included on the outside of the envelope or in the subject line of the e-mail (if customer has agreed to receive official documents by e-mail) that states, "Contract Expiration Notice;"

(C) A written notice of contract expiration (whether with the bill or in a separate envelope) shall set out:

(i) The approximate date or the billing cycle and month the existing contract will expire.

(ii) A statement in bold lettering no smaller than 12 point font that no termination penalty shall apply 14 days prior to the date stated as the expiration date in the notice. No such statement is required if the customer would not be subject to a termination penalty under any circumstances.

(iii) A description of any renewal offers the REP chooses to make available to the customer and the location of the TOS and EFL for each of those products and a description of actions the customer needs to take to continue to receive service from the REP under the terms of any of the described renewal offers and the deadline by which actions must be taken.

(iv) A copy of the EFL for the default renewal product if the customer takes no action.

(v) A statement that if the customer takes no action, service to the customer will continue pursuant to the EFL for the default renewal product that shall be included as part of the notice of contract expiration. The TOS for the default renewal product shall be included as part of the notice, unless the TOS applicable to the customer's existing service also applies to the default renewal product.

(vi) A statement that the default service is month-to month and may be cancelled at any time with no fee.

(2) Affirmative consent. A customer that is currently receiving service from a REP may be re-enrolled with the REP for service with the same product under which the customer is currently receiving service, or a different product, by conducting an enrollment pursuant to §25.474 of this title or by obtaining the customer's consent in a recording, electronic document, or written letter of authorization consistent with the requirements of this subsection. Affirmative consent is not required when a REP serves the customer under a default renewal product pursuant to paragraph (1) of this subsection. Each recording, electronic document, or written consent form must:

(A) Indicate the customer's name, billing address, service address, ESI ID;

(B) Indicate the identification number of the TOS and EFL under which the customer will be served;

(C) Indicate if the customer has received, or when the customer will receive copies of the TOS, EFL and YRAC;

(D) Indicate the price(s) which the customer is agreeing to pay;

(E) Indicate the date or estimated date of the re-enrollment, the contract term, and the estimated start and end dates of contract term;

(F) Affirmatively inquire whether the customer has decided to enroll for service with the product, and contain the customer's affirmative response; and

(G) Be entirely in plain, easily understood language, in the language that the customer has chosen for communications.

(f) Terms of service document. The following information shall be conspicuously contained in the TOS:

(1) Identity and contact information. The REP's certified name and business name (dba) (if applicable), mailing address, e-mail and Internet address (if applicable), certification number, and a toll-free telephone number (with hours of operation and time-zone reference).

(2) Pricing and payment arrangements.

(A) Description of the amount of any routine non-recurring charges resulting from a move-in or switch that may be charged to the customer, including but not limited to an out-of-cycle meter read, and connection or reconnection fees;

(B) For small commercial customers, a description of the demand charge and how it will be applied, if applicable;

(C) An itemization, including name and cost, of any non-recurring charges for services that may be imposed on the customer for the retail electric product, including an application fee,

charges for default in payment or late payment, and returned checks charges;

(D) A description of any collection fees or costs that may be assessed to the customer by the REP and that cannot be quantified in the TOS; and

(E) A description of payment arrangements and bill payment assistance programs and low income energy efficiency programs offered by the REP.

(3) Deposits. If the REP requires deposits from its customers:

(A) a description of the conditions that will trigger a request for a deposit;

(B) the maximum amount of the deposit or the manner in which the deposit amount will be determined;

(C) a statement that interest will be paid on the deposit at the rate approved by the commission, and the conditions under which the customer may obtain a refund of a deposit;

(D) an explanation of the conditions under which a customer may establish satisfactory credit pursuant to §25.478 of this title (relating to Credit Requirements and Deposits);

(E) the right of a customer or applicant who qualifies for the rate reduction program to pay a required deposit that exceeds $50 in two equal installments pursuant to §25.478 of this title; and

(F) if applicable, the customer's right to post a letter of guarantee in lieu of a deposit pursuant to §25.478(i) of this title.

(4) Rescission, Termination and Disconnection.

(A) In a conspicuous and separate paragraph or box:

(i) A description of the right of a customer, for switch requests, to rescind service without fee or penalty of any kind within three federal business days after receiving the TOS, pursuant to §25.474 of this title; and

(ii) Detailed instructions for rescinding service, including the telephone number and, if available, facsimile number or e-mail address that the customer may use to rescind service.

(B) A statement as to how service can be terminated and any penalties that may apply;

(C) A statement of customer's ability to terminate service without penalty if customer moves to another premises and provides evidence that it is moving, if required, and a forwarding address; and

(D) If the REP has disconnection authority, pursuant to §25.483 of this title (relating to Disconnection of Service), a statement that the REP may order disconnection of the customer for non-payment.

(5) Antidiscrimination. A statement informing the customer that the REP cannot deny service or require a prepayment or deposit for service based on a customer's race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, level of income, disability, familial status, location of a customer in a economically distressed geographic area, or qualification for low income or energy efficiency services. For residential customers, a statement informing the customer that the REP cannot use a credit score, a credit history, or utility payment data as the basis for determining the price for electric service for a product with a contract term of 12 months or less.

(6) Other terms. Any other material terms and conditions, including exclusions, reservations, limitations of liability, or special equipment requirements, that are a part of the contract for the retail electric product.

(7) Contract expiration notice. For a term contract, the TOS shall contain a statement informing the customer that a contract expiration notice will be sent at least 14 days prior to the end of the initial contract term. The TOS shall also state that if the customer fails to take action to ensure the continued receipt of retail electric service upon the contract's expiration, the customer will continue to be served by the REP automatically pursuant to a default renewal product, which shall be a month-to-month product

(8) A statement describing the conditions under which the contract can change and the notice that will be provided if there is a change.

(9) Version number. A REP shall assign an identification number to each version of its TOS, and shall publish the number on the terms of service document.

(g) Electricity Facts Label. The EFL shall be unique for each product offered and shall include the information required in this subsection. Nothing in this subsection precludes a REP from charging a price that is less than its EFL would otherwise provide.

(1) Identity and contact information. The REP's certified name and business name (dba) (if applicable), mailing address, e-mail and Internet address (if applicable), certification number, and a toll-free telephone number (with hours of operation and time-zone reference).

(2) Pricing disclosures. Pricing information shall be disclosed by a REP in an EFL. The EFL shall state specifically whether the product is a fixed rate, variable price or indexed product.

(A) For a fixed rate product, the EFL shall provide the total average price for electric service reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, to the customer.

(B) For an indexed product, the EFL shall provide sample prices for electric service reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, resulting from a reasonable range of values for the inputs to the pre-defined pricing formula.

(C) For a variable price product, the EFL shall provide the total average price for electric service for the first billing cycle reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, to the customer.

(D) The total average price for electric service shall be expressed in cents per kilowatt hour, rounded to the nearest one-tenth of one cent for the following usage levels:

(i) For residential customers, 500, 1,000 and 2,000 kilowatt hours per month; and

(ii) For small commercial customers, 1,500, 2,500, and 3,500 kilowatt hours per month. If demand charges apply assume a 30 percent load factor.

(E) If a REP combines the charges for retail electric service with charges for any other product, the REP shall:

(i) If the electric product is sold separately from the other products, disclose the total price for electric service separately from other products; and

(ii) If the REP does not permit a customer to purchase the electric product without purchasing the other products or services, state the total charges for all products and services as the price of the total electric service. If the product has a one-time cost up front, for the purposes of the average price calculation, the cost of the product may be figured in over a 12-month period with 1/12 of the cost being attributed to a single month.

(F) The following shall be included on the EFL for specific product types:

(i) For indexed products, the formula used to determine an indexed product, including a website and phone number customers may contact to determine the current price.

(ii) For a variable price product that increases no more than a defined percentage as indexed to the customer's previous billing month's price, a notice in bold type no smaller than 12 point font: "This price is the price that will be applied during your first billing cycle; this price may increase by no more than {insert percentage} percent from month-to-month." For residential customers, the following additional statement is required: "Please review the historical price of this product available at {insert specific website address and toll-free telephone number}."

(iii) For all other variable price products, a notice in bold type no smaller than 12 point font: "This price is the price that will be applied during your first billing cycle; this price may change in subsequent months at the sole discretion of {insert REP name}. For residential customers, the following additional statement is required: "Please review the historical price of this product available at {insert specific website address and toll-free telephone number}."

(3) Fee Disclosures.

(A) If customers may be subject to a special charge for underground service or any similar charge that applies only in a part of the TDU service area, the EFL shall include a statement in the electricity price section that some customers will be subject to a special charge that is not included in the total average price for electric service and shall disclose how the customer can determine the price and applicability of the special charge.

(B) A listing of all fees assessed by the REP that may be charged to the customer and whether the fee is included in the recurring charges.

(4) Term Disclosure. EFL shall include disclosure of the length of term, minimum service term, if any, and early termination penalties, if any.

(5) Renewable Energy Disclosures. The EFL shall include the percentage of renewable energy of the electricity product and the percentage of renewable energy of the statewide average generation mix.

(6) Format of Electricity Facts Label. REPs must use the following format for the EFL with the pricing chart and disclosure chart shown. The additional language is for illustrative purposes. It does not include all reporting requirements as outlined above. Such subsections should be referred to for determination of the required reporting items on the EFL. Each EFL shall be printed in type no smaller than ten points in size, unless a different size is specified in this section, and shall be formatted as shown in this paragraph:
Figure: 16 TAC §25.475(g)(6)

(7) Version number. A REP shall assign an identification number to each version of its EFL, and shall publish the number on the EFL.

(h) Your Rights as a Customer disclosure. The information set out in this section shall be included in a REP's "Your Rights as a Customer" document, to summarize the standard customer protections provided by this subchapter or additional protections provided by the REP.

(1) A YRAC document shall be consistent with the TOS for the retail product.

(2) The YRAC document shall inform the customer of the REP's complaint resolution policy pursuant to §25.485 of this title (relating to Customer Access and Complaint Handling) and payment arrangements and deferred payment policies pursuant to §25.480 of this title (relating to Bill Payment and Adjustments).

(3) The YRAC document shall inform the customer of the REP's procedures for reporting outages and the steps necessary to have service restored or reconnected after an involuntary suspension or disconnection.

(4) The YRAC document shall inform the customer of the customer's right to have the meter tested pursuant to §25.124 of this title (relating to Meter Testing), or in accordance with the tariffs of a transmission and distribution utility, a municipally owned utility, or an electric cooperative, as applicable, and the REP's ability in all cases to make that request on behalf of the customer by a standard electronic market transaction, and the customer's right to be instructed on how to read the meter, if applicable.

(5) The YRAC document shall inform the customer of the availability of:

(A) Financial and energy assistance programs for residential customers;

(B) Any special services such as readers or notices in Braille or TTY;

(C) Special policies or programs available to residential customers with physical disabilities, including residential customers who have a critical need for electric service to maintain life support systems; and

(D) Discounts for qualified low-income residential customers.

(6) The YRAC document shall inform the customer of the following customer rights and protections:

(A) Unauthorized switch protections applicable under §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider);

(B) The customer's right to dispute unauthorized charges on the customer's bill as set forth in §25.481 of this title (relating to Unauthorized Charges);

(C) Protections relating to disconnection of service pursuant to §25.483 of this title;

(D) Non-English language requirements pursuant to §25.473 of this title (relating to Non-English Language Requirements);

(E) Availability of a Do Not Call List pursuant to §25.484 of this title (relating to Electric No-Call List) and §26.37 of this title (relating to Texas No-Call List); and

(F) Privacy rights regarding customer proprietary information as provided by §25.472 of this title (relating to Privacy of Customer Information).

(7) Identity and contact information. The REP's certified name and business name (dba), certification number, mailing address,

e-mail and Internet address (if applicable), and a toll-free telephone number (with hours of operation and time-zone reference) at which the customer may obtain information concerning the product.

(i) Advertising claims. If a REP or aggregator advertises or markets the specific benefits of a particular electric product, the REP or aggregator shall provide the name of the electric product offered in the advertising or marketing materials to the commission or its staff, upon request. All advertisements and marketing materials distributed by or on behalf of a REP or aggregator shall comply with this section. REPs and aggregators are responsible for representations to customers and prospective customers by employees or other agents of the REP concerning retail electric service that are made through advertising, marketing or other means.

(1) Print advertisements. Print advertisements and marketing materials, including direct mail solicitations that make any claims regarding price, savings, or environmental quality for an electricity product of the REP compared to a product offered by another REP shall include the EFL of the REP making the claim. In lieu of including an EFL, the following statement shall be provided: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number, and Internet address (if available) of the REP)." If the REPs phone number or website address is included on the advertisement, such phone number or website address is not required in the disclaimer statement. Upon request, a REP shall provide to the commission the contract documents relating to a product being advertised and any information used to develop or substantiate comparisons made in the advertisement.

(2) Television, radio, and internet advertisements. A REP shall include the following statement in any television, Internet, or radio advertisement that makes a specific claim about price, savings, or environmental quality for an electricity product of the REP compared to a product offered by another REP: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number and website (if available) of the REP)." If the REPs phone number or website address is included on the advertisement, such phone number or website address is not required in the disclaimer statement. This statement is not required for general statements regarding savings or environmental quality, but shall be provided if a specific price is included in the advertisement, or if a specific statement about savings or environmental quality compared to another REP is made. Upon request, a REP shall provide to the commission the contract documents relating to a product being advertised and any information used to develop or substantiate comparisons made in the advertisement.

(3) Outdoor advertisements. A REP shall include, in a font size and format that is legible to the intended audience, its certified name or commission authorized business name, certification number, telephone number and Internet address (if available).

(4) Renewable energy claims. A REP shall authenticate its sales of renewable energy in accordance with §25.476 of this title (relating to Renewable and Green Energy Verification). If a REP relies on supply contracts to authenticate its sales of renewable energy, it shall file a report with the commission, not later than March 15 of each year demonstrating its compliance with this paragraph and §25.476 of this title.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2009.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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16 TAC §25.476

This amendment is adopted under the Public Utility Regulatory Act (PURA), §14.002 which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, PURA §39.101(a)(5) which entitles a customer to be protected from discrimination on the basis of race, color, sex, nationality, religion, or marital status; PURA §39.101(b)(5) which entitles a customer to receive sufficient information to make an informed choice of provider; PURA §39.101(b)(6) which entitles a customer to be protected from unfair, misleading, or deceptive practices.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, 17.004(a)(1), 39.101(a)(5), 39.101(b)(5), 39.101(b)(6).

§25.476. Renewable and Green Energy Verification.

(a) Purpose. The purpose of this section is to establish the procedures by which retail electric providers (REPs) calculate and compose their renewable content pursuant to §25.475 of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers) and to establish guidelines and verification for claims of "green" products.

(b) Application.

(1) This section applies to all REPs. Additionally, some of the reporting requirements established in this section apply to the registration agent and to all owners of generation assets as defined in subsection (c) of this section.

(2) Nothing in this section shall be construed as protecting a REP against prosecution under deceptive trade practices statutes.

(3) In accordance with the Public Utility Regulatory Act (PURA) §39.001(b)(4), the commission and the registration agent will ensure the confidentiality of competitively sensitive information, reported to the commission or the registration agent under this section.

(c) Definitions. The definitions set forth in §25.471(d) of this title (relating to General Provisions of Customer Protection Rules) apply to this section. In addition, the following words and terms, when used in this section, shall have the following meanings unless the context indicates otherwise:

(1) Default scorecard--The estimated fuel mix and environmental impact of all electricity in Texas that is not authenticated by retiring renewable energy credits (RECs).

(2) Generation owner--A power generation company, river authority, municipally owned utility, electric cooperative, or any other entity that owns electric generating facilities in the state of Texas.

(3) Generator scorecard--The aggregated fuel mix and environmental impact of all generating facilities located in Texas that are owned by the same generation owner.

(4) New product--An electricity product during the first year it is marketed to customers.

(5) Renewable energy credit offset (REC offset)--A non-tradable allowance as defined and created by §25.173 of this title (relating to Goal for Renewable Energy). For the purposes of this section, a REC offset authenticates the renewable attributes, but not the quantity, of generation produced by its associated facility.

(d) Marketing standards for "green" and "renewable" electricity products.

(1) A REP may market an electricity product as "green" if:

(A) All of the product's fuel mix is renewable energy as defined in PURA §39.904(d), Texas natural gas as specified in PURA §39.904(d)(2), or a combination thereof; and

(B) All statements representing the product as "green," if not containing 100% renewable energy, as defined in PURA §39.904(d), include a footnote, parenthetical note, or other obvious disclaimer that "A 'green' product may include Texas natural gas and renewable energy."

(2) A REP may market an electricity product as "renewable" or label an electricity product on the EFL as "renewable" only if:

(A) All of the product's fuel mix is renewable energy as defined in PURA §39.904(d); or

(B) All statements representing the product as "renewable" use the format "x% renewable," where "x" is the product's renewable energy fuel mix percentage.

(3) If a REP makes marketing claims about a product's "green" content on the basis of its use of natural gas as a fuel, the REP must include with the report required under subsection (f)(1) of this section proof that the natural gas used to generate the electricity was produced in Texas.

(e) Compilation of scorecard data.

(1) The registration agent shall create and maintain a database of generator scorecards reflecting each generation owner's company-wide fuel mix and environmental impact data based on generating facilities located in Texas.

(2) Each generation owner's fuel mix and environmental impact data for the preceding calendar year shall be published on the registration agent's Internet web site by April 1 of each year and shall state:

(A) the percentage of MWhs generated from each of the following fuel sources: coal and lignite, natural gas, nuclear, renewable energy, and other sources; and

(B) the MWh-weighted average annual emissions rates in pounds per 1,000 kWh for the aggregate generation sources of the generation owner for carbon dioxide, nitrogen oxides, particulates, sulfur dioxide, and spent nuclear fuel produced (with spent nuclear fuel annualized using standard industry conversion factors).

(3) Not later than March 1 of each year, each generation owner shall report to the registration agent the following data for the preceding calendar year: net generation in MWh from each of its generating units in Texas; the type of fuel used by each of its generating units in Texas; and the MWh-weighted average annual emissions rate, on an aggregate basis for all of its generating units in Texas (in pounds per 1,000 kWh) for carbon dioxide, nitrogen oxides, particulates, sulfur dioxide, and nuclear waste. For purposes of calculating its average emissions rates, each generation owner shall rely upon emissions data that it submits to the United States Environmental Protection Agency (EPA), the Texas Commission on Environmental Quality (TCEQ), or the best available data if the generation owner does not submit pertinent data to the EPA or TCEQ. A generation owner shall not be required to submit information to the registration agent regarding the net generation of its generating units located within the Electric Reliability Council of Texas (ERCOT) region if, upon request, the registration agent advises the owner of generation assets that it already has such information available from its polled settlement meter data.

(4) Not later than April 1 of each year, the registration agent shall calculate and publish on its Internet website a state average fuel mix, statewide system average emission rates for each type of emission, and a default scorecard to account for all electric generation in the state that is not authenticated as defined in subsection (c)(1) of this section.

(A) The default fuel mix shall be the percentage of total MWh of generation not authenticated that has been obtained from each fuel type.

(B) Default emission rates for each type of emission shall be calculated by dividing total pounds of emissions or waste by total MWh, using data only for generation not authenticated.

(f) Calculating renewable generation and authenticating "green" claims.

(1) Not later than March 15 of each year, each REP shall report to the registration agent attestations from power generators that the natural gas used to generate electricity supplied to the REP was produced in Texas, if during the preceding calendar year and the current calendar year the REP markets "green" electricity on the basis of that power.

(2) For power purchased from sources outside of Texas, a supply contract between a REP and the owner of a generating facility may be used to authenticate the fuel mix for electricity generated at that facility and sold at retail in Texas.

(A) The contract must identify a specific generating facility from which the REP has obtained electricity that it sold to retail customers in Texas during the preceding calendar year.

(B) A REP that intends to rely upon a supply contract with an out-of-state generator to authenticate fuel mix shall submit a report to the registration agent for the specified generating facility no later than March 1 of each year that reports the facility's annual fuel mix.

(3) For the purposes of EFL disclosures, the retirement of RECs shall be the only method of authenticating generation for which a REC has been issued under §25.173 of this title. The retirement of a REC shall be equivalent to one megawatt-hour of generation from renewable resources. The use of RECs to authenticate the use of renewable fuels must be consistent with REC account information maintained by the Renewable Energy Credits Trading Program Administrator. A REC offset may be used to authenticate the renewable attributes of the current MWh output from its associated supply contract.

(4) In determining the renewable content percentages to be disclosed on the EFL for a product pursuant to §25.475 of this title, the REP shall rely upon the following sources of information: the Texas State Average Fuel Mix published by the registration agent under subsection (e) of this section; retired RECs; and actual energy production during the calendar year from resources that are awarded REC offsets by the REC program administrator. The REP may also rely on power purchased from sources outside of Texas, if it has a supply contract with the owner of a generating facility and submits a report to the registration agent concerning the fuel mix of the facility, in accordance with this section.

(5) If a REP offers multiple electricity products that differ with regard to renewable energy content the REP:

(A) may apply any supply contract to the calculation of any product EFL as long as the sum of MWh applied does not exceed the MWh acquired under the contract; and

(B) may apply any number of RECs to the calculation of any product EFL as long as:

(i) the number of RECs applied to all product EFLs is consistent with the number of RECs the retailer has retired with the REC Trading Program Administrator; and

(ii) the number of RECs applied to each product EFL results in a renewable energy content for each product that is equal to or greater than a benchmark to be calculated from data maintained by the REC Trading Program Administrator. The benchmark shall be defined on an annual basis as:
Figure: 16 TAC §25.476(f)(5)(B)(ii)

(6) Any REP may anticipate the renewable content of a new product. The EFL shall state that the renewable content is an estimate that will be verified.

(g) Fuel Mix for Renewable Energy.

(1) The fuel mix percentage for renewable energy shall be disclosed on the EFL for the product pursuant to §25.475 of this title. The percentage used shall be rounded to the nearest whole number.

(2) Renewable energy claims. A REP may authenticate its sales of renewable energy by requesting that the program administrator of the renewable energy credits trading program established pursuant to §25.173(d) of this title retire a renewable energy credit for each megawatt-hour of renewable energy sold to its customers.

(h) Annual update. Each REP shall update its EFL for each of its currently offered products or products offered during the preceding calendar year no later than July 1 of each year, so that the EFL displays the renewable energy percentages determined pursuant to this section and reported to the registration agent for that product for generation purchased during the preceding calendar year.

(i) Compliance and enforcement.

(1) Upon request from the commission staff, a REP shall provide a detailed explanation or accounting of the means by which it has authenticated any renewable or "green" energy claims in an EFL or any information used for marketing a product.

(2) The commission shall coordinate its enforcement efforts regarding the prosecution of fraudulent, misleading, deceptive, and anticompetitive business practices with the Office of the Attorney General, Consumer Protection Division in order to ensure consistent treatment of specific alleged violations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2009.

TRD-200900834
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 16, 2009
Proposal publication date: August 29, 2008
For further information, please call: (512) 936-7223

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PART 8. TEXAS RACING COMMISSION

CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING
SUBCHAPTER D. RUNNING OF THE RACE
DIVISION 2. PRE-RACE PROCEDURE

16 TAC §313.426

The Texas Racing Commission adopts new 16 TAC §313.426, Toe Grabs Prohibited, without changes to the proposed text as published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10265).

This new section prohibits Thoroughbred and Arabian horses from competing while wearing front horseshoes that have toe grabs with a height greater than two millimeters. It also prohibits Quarter Horses, Paint Horses, and Apaloosas from competing while wearing front horseshoes that have toe grabs with a height greater than four millimeters. In addition, the rule prohibits bends, jar calks, stickers, or any other traction device on the front hooves of any horse breed while racing.

The Commission received no comments in response to the proposal.

The new section is adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 2, 2009.

TRD-200900907
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: March 22, 2009
Proposal publication date: December 19, 2008
For further information, please call: (512) 833-6699

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CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING
SUBCHAPTER D. DRUG TESTING
DIVISION 3. PROVISIONS FOR HORSES

16 TAC §319.364

The Texas Racing Commission adopts new 16 TAC §319.364, Testing for Androgenic-Anabolic Steroids, without changes to the proposed text as published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10265).

This new section establishes the general principle that a racehorse may not carry androgenic-anabolic steroids or their metabolites in its body while competing. The rule creates limited exceptions for the naturally occurring substances boldenone

and testosterone and for the residues of the major metabolites of stanozolol and nandrolone.

The Commission received no comments in response to the proposal.

The new section is adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §3.16, which requires the Commission to adopt rules requiring testing for the use of prohibited substances at a racetrack.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mark Fenner
General Counsel
Texas Racing Commission
Effective date: March 22, 2009
Proposal publication date: December 19, 2008
For further information, please call: (512) 833-6699

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER A. PROCUREMENT

16 TAC §§401.101 - 401.103

The Texas Lottery Commission (Commission) adopts the repeal of 16 TAC §401.101 (relating to Lottery Procurement Procedures), §401.102 (relating to Protests of the Terms of a Formal Competitive Solicitation), and §401.103 (relating to Protests of Contract Award), without changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10396). The repeal is adopted concurrently with the adoption of new §401.101 (relating to Lottery Procurement Procedures), §401.102 (relating to Protests of the Terms of a Formal Competitive Solicitation), and §401.103 (relating to Protests of Contract Award).

The purpose of the repeal of §401.101 Lottery Procurement Procedures and the proposed adoption of a new §401.101 Lottery Procurement Procedures is to provide for a Best and Final Offer process; to provide for the selection of several top proposers found to be in a competitive range; to clarify that the agency has the discretion of negotiating with the proposers in the competitive range simultaneously, or in order, beginning at the highest ranked proposer; to provide a definition for "proprietary product" and to establish the process to be used in the purchase of a proprietary product; to make the definition of "principal place of business" generally conform with the judicially determined meaning of the term; to include "statewide contract" in the definition of "state contract"; to include "printing services" in the methods of procurement intended to be used by the agency; to authorize the agency to seek the assistance of the Comptroller of Public Accounts; to standardize the Request for Proposal (RFP) and the RFP evaluation process; to generally clarify the purchasing process and conform the rules to the process currently followed by the agency; and to conform the purchasing process to the statutes that apply to the Texas Lottery Commission.

The purpose of the repeal of §401.102 and §401.103, and the adoption of new §401.102 regarding Protests of the Terms of a Formal Competitive Solicitation, and §401.103 regarding Protests of a Contract Award is to provide for a timely, efficient, and effective protest procedure for formal solicitations and contract awards; to recognize and allow some protests to be resolved at the staff level, or executive director level, yet still provide a path for protestants to carry their protests to the Commissioners of the Texas Lottery Commission, where appropriate; to provide for a member of the legal staff who has not been involved in the procurement process to provide factual and legal advice and recommendation to the Commissioners; and to clarify and conform the protest process to applicable law and practice.

There will be no impact on the public benefit as a result of the repeal of 16 TAC §401.101 because a new rule is being adopted concurrently. The anticipated public benefit of the adopted new rule will be that it promotes increased competition among vendors; a better understanding of requirements for responses to requests for bids and proposals for the vendor community; and conforms the agency rules to the statutory requirements and agency practices.

There will be no impact on the public benefit as a result of the repeal of 16 TAC §401.102 and §401.103 because a new rule is being adopted concurrently. The anticipated public benefit of the new adopted rule will be that the rule provides ease and efficiency to the vendor community to protest the agency's solicitation of bids or proposals, and of contract awards; and will conform the agency rules to the statutory requirements and agency practices.

The Commission received no comments during the public comment period.

The repeal is adopted under Texas Government Code, §466.015, which authorizes the Commission to adopt rules governing the operation of the lottery. The repeal is also adopted under Texas Government Code, §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 23, 2009.

TRD-200900810
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: March 15, 2009
Proposal publication date: December 26, 2008
For further information, please call: (512) 344-5012

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16 TAC §401.101

The Texas Lottery Commission (Commission) adopts new 16 TAC §401.101 (relating to Lottery Procurement Procedures), with changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10397). The new rule is adopted concurrently with the repeal of 16 TAC §401.101 (relating to Lottery Procurement Procedures). A typographical error was discovered in subsection (e)(5). The word "bid" was missing from the proposed version of the rule, and has been added to the adopted version of the rule.

The purpose of the new rule is to provide for a Best and Final Offer process; to provide for the selection of several top proposers found to be in a competitive range; to clarify that the agency has the discretion of negotiating with the proposers in the competitive range simultaneously, or in order, beginning at the highest ranked proposer; to provide a definition for "proprietary product" and to establish the process to be used in the purchase of a proprietary product; to make the definition of "principal place of business" generally conform with the judicially determined meaning of the term; to include "statewide contract" in the definition of "state contract"; to include "printing services" in the methods of procurement intended to be used by the agency; to authorize the agency to seek the assistance of the Comptroller of Public Accounts; to standardize the Request for Proposal (RFP) and the RFP evaluation process; to generally clarify the purchasing process and conform the rules to the process currently followed by the agency; and to conform the purchasing process to the statutes that apply to the Texas Lottery Commission.

The anticipated public benefit of the adopted new rule will be that it promotes increased competition among vendors; a better understanding of requirements for responses to requests for bids and proposals for the vendor community; and conforms the agency rules to the statutory requirements and agency practices.

The Commission received no comments during the public comment period.

The new rule is adopted under Texas Government Code, §466.015, which authorizes the Commission to adopt rules governing the operation of the lottery. The new rule is also adopted under Texas Government Code, §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

§401.101. Lottery Procurement Procedures.

(a) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The State Lottery Act.

(2) Agency--For the purposes of these rules dealing with procurements for the administration of the lottery, the term "agency" refers to the commission as defined in paragraph (5) of this subsection.

(3) Best and Final Offer (BAFO)--A revised final bid or proposal submitted after all clarifications, discussions, and negotiations with the agency.

(4) Executive director--The executive director of the Commission.

(5) Commission--The state agency established under Chapter 466 and Chapter 467, Government Code. However, these rules apply only to the procurement of goods and services for the administration of the lottery authorized by the State Lottery Act. For the sake of clarity, these procurement rules will refer to the commission as "agency" and to the appointed board as the "Texas Lottery Commission".

(6) Cost--The price at which the agency can purchase goods and/or services.

(7) Electronic State Business Daily or Business Daily--The website administered by the Comptroller of Public Accounts, or its successor, on which procurement opportunities are advertised in electronic format.

(8) Emergency--Unforeseeable circumstances that may require an immediate response to avert an actual or potential public threat, or serious operational or financial loss to the agency, and in which compliance with normal procurement practice is impracticable or contrary to the public interest.

(9) Emergency purchase --Immediate procurements to meet an emergency.

(10) Goods--Supplies, materials, and equipment.

(11) IFB--A written invitation for bids.

(12) Lottery--The procedures and operations of the Texas Lottery Commission under the State Lottery Act through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize.

(13) Nonresident bidder or proposer--"Nonresident bidder or proposer" refers to a person who is not a "resident bidder or proposer".

(14) Principal place of business--The state in which the head office of a business is located; generally, where the executive management is located and the business records are maintained.

(15) Produced in Texas--Those goods that are manufactured in Texas, excluding the sole process of packaging or repackaging. Packaging or repackaging does not constitute being manufactured in Texas.

(16) Proprietary product--A product or service that is unique to a single vendor and is not available from other sources.

(17) Resident bidder or proposer--"Resident bidder or proposer" refers to a person whose principal place of business is in this state, including a contractor whose ultimate parent company or majority owner has its principal place of business in this state.

(18) RFP--A written request for proposals.

(19) RFQ--A written request for qualifications.

(20) Services--Fungible services, specialized services, or unique services, including, by way or example, but not limitation: facility services (i.e., the lease of real property, including utility and custodial service), telecommunications services, advertising services, consultant services, personal services and professional services.

(21) State or statewide contract--A contract for goods or services established and administered by another state agency (e.g., Texas Comptroller of Public Accounts, Texas Department of Information Resources) for use by all state agencies.

(22) Texas Lottery Commission--The appointive board or commission established in Chapter 467, Government Code.

(b) Use and Effect of Rules. These rules are prescribed for the performance of the statutory powers and functions vested in the Commission. In no event shall they, or any of them, be construed as a

limitation or restriction upon the exercise of any discretion authorized to be exercised by the Commission.

(c) Procurement method.

(1) For the purchase or lease of goods and services not expected to exceed $5,000, or for the purchase or lease of goods and services available under a state contract, a competitive solicitation, whether formal or informal, may be conducted, but is not required.

(2) For the purchase or lease of goods and services not expected to exceed $25,000, the agency, at a minimum, will conduct an informal competitive solicitation in an attempt to obtain at least three competitive bids.

(3) For the purchase or lease of goods and services expected to exceed $25,000, the agency will conduct a formal competitive solicitation in an attempt to obtain at least three competitive bids or proposals.

(4) Printing services. For the purchase of printing services, the agency will follow the appropriate procurement method outlined in paragraphs (1) - (3) of this subsection.

(5) Emergency purchase. Notwithstanding paragraphs (1) - (4) of this subsection, the agency may make an emergency purchase or lease of goods or services. Prior to making an emergency purchase or lease of goods or services, the existence of an emergency should be documented. For emergency purchases in excess of $25,000, the agency may conduct an informal competitive solicitation in an attempt to obtain at least three competitive bids. In response to an emergency, the agency may procure goods or services in the most expeditious manner deemed appropriate, including from a sole source. Whenever possible, contacts will be made with multiple sources in order to receive as much competitive benefit as possible.

(6) Proprietary purchase. When the agency believes that goods or services are proprietary to one vendor or one manufacturer, a written proprietary purchase justification will be included in the procurement file. If the estimated purchase price exceeds $25,000 for commodities or $100,000 for services, the procurement will be posted on the Electronic State Business Daily prior to a purchase order or contract being issued.

(7) Notwithstanding paragraphs (1) - (4) of this subsection, the agency may make a purchase or lease of goods or services under any other procedure not otherwise prohibited by law.

(d) Informal competitive solicitations.

(1) An informal competitive solicitation is a process conducted in an effort to receive at least three competitive bids for a specifically identified good or service, without the advertisement and issuance of an IFB or RFP. The bids may be solicited by letter, electronic mail, facsimile, or telephone call. The following information will be recorded by the agency in the solicitation file:

(A) the name and telephone number of each person or company to which the solicitation was provided;

(B) the name and telephone number of the person or company submitting the price bid;

(C) the date the bid was received;

(D) the amount of the bid;

(E) bidder's HUB status; and

(F) the name and telephone number of the person receiving the bid for the agency.

(2) The agency will award a contract to the qualified bidder submitting the lowest and best bid, except that the agency may reject all bids if it is determined to be in the best interest of the state.

(3) The contract will be awarded by the issuance of a written purchase order.

(e) Formal competitive solicitations.

(1) A formal competitive solicitation is a process conducted in order to receive at least three sealed competitive bids or proposals pursuant to the issuance of an IFB, RFP, or RFQ respectively.

(A) An IFB will be used when the agency is able to describe, by way of established specifications, exactly what it wishes to procure, and wants bidders to offer such at a specific price.

(B) An RFP will be used when the agency knows generally what it wishes to procure in order to accomplish a certain goal(s) or objective(s); requirements cannot be completely and accurately described; requirements can be satisfied in a number of ways, all of which could be acceptable; or, where oral or written communications with proposers may be necessary in order to effectively communicate requirements and/or assess proposals, and the agency wants proposers to offer a solution(s) to address such need(s) at a specific price(s).

(C) An RFQ will be used when the agency wants to procure professional services and evaluate proposers solely on their qualifications.

(2) Where time and circumstances permit, the agency will advertise formal competitive solicitations, whether by IFB, RFP, or RFQ on the Electronic State Business Daily. The agency may advertise such solicitations in other media determined appropriate by the agency.

(3) For all formal competitive solicitations, the agency will award a contract to the most qualified bidder or proposer as determined during the evaluation of the proposals. The agency may reject all bids if it is determined to be in the best interest of the lottery. At the time a purchase order is issued or a contract is executed, the agency will notify, in writing, all other bidders of the contract award by facsimile, or by certified mail, return receipt requested, or by overnight mail. Any information relating to the solicitation not made privileged from disclosure by law will be made available for public disclosure, after award of a contract, pursuant to the Texas Public Information Act.

(4) For those formal competitive solicitations where less than three bids or proposals are received, the agency will document the reasons, if known, for the lack of three bids or proposals. If less than three bids or proposals are received, the agency may cancel the solicitation and conduct another solicitation, or it may award a contract if one acceptable bid or proposal is received.

(5) For formal competitive solicitations where an IFB is used, the agency will award a contract to the qualified bidder submitting the lowest and best bid, as determined during the evaluation of the bids.

(f) RFP.

(1) Submission. When an RFP is used by the agency, the RFP will contain, at a minimum, the following:

(A) a general description of the goods and/or services to be provided, and a specific identification of the goals or objectives to be achieved;

(B) a description of the format proposals must follow and the elements they must contain;

(C) the time and date proposals are due, and the location and person to whom they are to be submitted;

(D) an identification of the process to be utilized in evaluating proposals; and

(E) a listing of the factors to be utilized in evaluating proposals and awarding a contract. At a minimum, the factors should include:

(i) the proposer's price to provide the goods or services;

(ii) the probable quality of the offered goods or services;

(iii) The agency's evaluation of the likelihood of the proposal to produce the desired outcome for the agency, considering, among other criteria:

(I) the quality of the proposer's past performance in contracting with the agency, with other state entities, or with private sector entities;

(II) the qualifications of the proposer's personnel;

(III) the experience of the proposer in providing the requested goods or services;

(IV) the financial status of the proposer; and

(iv) whether the proposer performed the good faith effort required by the HUB subcontracting plan, when the agency has determined that subcontracting is probable.

(2) Evaluation Process. The agency will, prior to the deadline for receipt of proposals, develop and establish comprehensive evaluation criteria to be utilized by an evaluation committee in evaluating the proposals. All proposals that are responsive to the RFP will be reviewed by the evaluation committee. As part of the initial evaluation process, proposers may be requested to make an oral presentation to the committee, which may include an inspection trip to the proposer's facilities. The evaluation committee may seek advice from consultants. If consultants are employed, they may be provided all information provided by the proposers. The evaluation committee will evaluate and rank all proposals in accordance with the evaluation criteria.

(3) Best and Final Offers (BAFO). The agency may select top proposers, which may each be given an opportunity to discuss, clarify, and negotiate with the agency, and submit revisions to their respective proposals to the agency through a BAFO process. During discussions between the proposers and the agency, no information from a competing proposal may be revealed by the agency to another competitor. Any type of auction practice or allowing the transfer of technical information is specifically prohibited. At the conclusion of the discussions, BAFOs may be formally requested from the proposers and a deadline will be set for submission. BAFOs will be submitted by supplemental pages and not a complete resubmission of the proposal. All BAFOs will be reviewed by the evaluation committee. The evaluation committee will evaluate and rank the BAFO response together with the original proposal in accordance with the evaluation criteria.

(4) Negotiation. If a BAFO process is not used, the agency will attempt to negotiate a contract with the selected proposer. If a contract cannot be negotiated with the selected proposer on terms the agency determines reasonable, negotiations with that proposer will be terminated, and negotiations will be undertaken with the next highest ranked proposer. This process will be continued until a contract is executed by a proposer and the agency, or negotiations are terminated. If no contract is executed, the agency may attempt to negotiate a contract with any of the other proposers or cancel the solicitation. Negotiations will continue until a contract is executed or all proposals are rejected, or the solicitation is canceled.

(g) RFQ.

(1) Submission. When an RFQ is used by the agency, the RFQ will contain, at a minimum, the following:

(A) a general description of the professional services to be performed, and a specific identification of the goals or objectives to be achieved;

(B) a description of the format proposals must follow and the elements they must contain;

(C) the time and date proposals are due, and the location and person to whom they are to be submitted;

(D) an identification of the process to be utilized in evaluating proposals and awarding a contract; and

(E) a listing of the factors to be utilized in evaluating proposals and awarding a contract. At a minimum, the factors should include:

(i) the demonstrated competence and qualifications to perform the services;

(ii) the quality of the proposer's past performance in contracting with the agency, with other state entities, or with private sector entities;

(iii) the financial status of the proposer;

(iv) the qualifications of the proposer's personnel;

(v) the experience of the proposer in providing the requested services; and

(vi) whether the proposer performed the good faith effort required by the HUB subcontracting plan, when the agency has determined that subcontracting is probable.

(2) Evaluation Process. The agency will, prior to the deadline for receipt of proposals, develop and establish comprehensive evaluation criteria to be utilized by an evaluation committee in evaluating the proposals. All proposals that are responsive to the RFQ will be reviewed by the evaluation committee. The evaluation committee will evaluate and rank all proposals in accordance with the evaluation criteria.

(3) Negotiation. The agency will then attempt to negotiate a contract, for a fair and reasonable price, with the selected proposer or the agency may engage in simultaneous negotiations with multiple proposers. If a contract cannot be negotiated with the selected proposer on terms the agency determines reasonable, negotiations with that proposer will be terminated, and negotiations will be undertaken with the next highest ranked proposer. This process will continue until a contract is executed by a proposer and the agency, or negotiations are terminated. If no contract is executed, the agency may attempt to negotiate a contract with any of the other proposers. Negotiations will continue until a contract is executed or all proposals are rejected.

(h) Preferences.

(1) If, after application of the preferences required by Texas law, a tie continues, the contract award will be made by the drawing of lots.

(2) A bidder or proposer entitled to a preference(s) under Texas law shall claim the preference(s) in its bid or proposal.

(i) Contract terms. A contract for the purchase or lease of goods or services relating to the implementation, operation, or admin-

istration of the lottery will provide that the executive director may terminate the contract, without penalty, if an investigation made pursuant to the Act reveals that the person to whom the contract was awarded would not be eligible to receive a sales agent license under the State Lottery Act, Texas Government Code, §466.155. An IFB, RFP or RFQ may require that bidders or proposers provide in their bids or proposals sufficient information to allow the agency to determine whether the bidder or proposer meets the eligibility requirements for a sales agent license.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200900823
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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Proposal publication date: December 26, 2008
For further information, please call: (512) 344-5012

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16 TAC §401.102

The Texas Lottery Commission (Commission) adopts new 16 TAC §401.102 (relating to Protests of the Terms of a Formal Competitive Solicitation), with changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10401). Specifically, on review, the Commission discovered that it had omitted the word "formal" before "solicitation" and "competitive solicitation" in subsections (b) and (d). The adopted version has added this language. At subsection (f), "any responses, the director of administration's determination, including any reasoning that supports his determination," has been added and the word "appeal" replaces the word "protest. Finally, the first sentence of subsection (i) has been clarified and now reads as follows: "The Texas Lottery Commission will review the protest, the solicitation file, consider the oral argument, if any, the executive director's determination, including any reasoning that supports his determination and his presentation, if any, the staff attorney's recommendation, and will make a written determination of the protest." The new rule is adopted concurrently with the repeal of 16 TAC §401.102 (relating to Protests of the Terms of a Formal Competitive Solicitation).

The purpose of the new rule is to provide for a timely, efficient, and effective protest procedure to published solicitations; to recognize and allow some protests to be resolved at the staff level, or executive director level, yet still provide a path for protestants to carry their protests to the Commissioners of the Texas Lottery Commission; to provide for a member of the legal staff who has not been involved in the procurement process to provide factual and legal advice and recommendation to the Commissioners; and to clarify and conform the protest process to applicable law and practice.

The anticipated public benefit of the adopted new rule will be that the rule provide ease and efficiency to the vendor community to protest the agency's solicitation of bids or proposals; and will conform the agency rules to the statutory requirements and agency practices.

The Commission received no comments during the public comment period.

The new rule is adopted under Texas Government Code, §466.015, which authorizes the Commission to adopt rules governing the operation of the lottery; and under Texas Government Code, §466.101, which authorizes the executive director to adopt procedures for the procurements and protests of procurement decisions of the Commission. The new rule is also adopted under Texas Government Code, §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

§401.102. Protests of the Terms of a Formal Competitive Solicitation.

(a) Any person aggrieved by the terms of any formal solicitation may protest the agency's action to the director of administration. If the director of administration cannot resolve the protest, the aggrieved party may appeal the director of administration's decision to the executive director. If the executive director cannot resolve the protest, the aggrieved party may appeal the executive director's decision to the Texas Lottery Commission. Irrespective of the foregoing provision and the following processes, at any time, the executive director may refer a protest directly to the Texas Lottery Commission for determination. The procedures applicable to an appeal to the commission will then apply.

(b) A protest of the terms of any formal solicitation must be filed, in writing, with the commission's general counsel within 72 hours after issuance of the formal competitive solicitation. The stamp affixed by the office of the general counsel shall determine the time and date of filing. If the protest is filed by facsimile transmission, the quality of the original hard copy shall be clear and dark enough to transmit legibly and it shall be the sender's sole responsibility to ensure complete, timely, and legible delivery to the office of the general counsel. A protest not filed timely will not be considered, and the protestant will be so notified in writing by the commission's general counsel. A protestant may supplement its filed protest. The deadline to supplement is 5 p.m. central time, 10 days after the formal solicitation is issued.

(c) To be considered, a protest must contain:

(1) a specific identification of the statutory provision, rule provision, or procurement procedure allegedly violated;

(2) a brief statement of the relevant facts;

(3) an identification of the issue or issues to be resolved;

(4) arguments and authorities in support of the protest; and

(5) an affidavit that the contents of the protest are true and correct.

(d) In the event of a timely filed protest of a formal competitive solicitation, the agency will not proceed with issuance of a purchase order or execution of a contract unless the agency determines, in writing, that such action is necessary to protect the interests of the lottery.

(e) The director of administration will review the protest, and the solicitation file, and will make a written determination of the protest. The written determination of the protest may include a determination canceling the solicitation. The director of administration's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. An appeal of the decision of the director of administration of any protest must be filed, in writing, with the commission's general counsel by 5 p.m. of the next business day after issuance of the written determination. The stamp affixed by the office of the general counsel shall determine the time and date of filing.

(f) On appeal of the director of administration's determination, the executive director will review the protest, and the solicitation file, any responses, the director of administration's determination, including any reasoning that supports his determination and will make a written determination of the appeal. The written determination on the protest may include a determination canceling the solicitation. The executive director's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. An appeal to the Texas Lottery Commission of the determination of the executive director must be filed, in writing, with the commission's general counsel by 5 p.m. of the next business day after issuance of the written determination. The stamp affixed by the office of the general counsel shall determine the time and date of filing.

(g) On timely receipt of the notice of appeal to the Texas Lottery Commission, the general counsel will appoint a staff attorney who has not participated in the drafting of the solicitation or rendered legal advice with respect to the solicitation to evaluate the protest. The staff attorney will make a written recommendation to the Texas Lottery Commission, including proposed findings of fact and conclusions of law.

(h) The Texas Lottery Commission, at its discretion, may allow oral argument by the protestant. The following procedure will be followed if the Texas Lottery Commission grants oral argument:

(1) Each oral argument may be limited in time as deemed appropriate by the Texas Lottery Commission.

(2) Each oral argument will be based solely on the written protest.

(3) The executive director may be present, have the opportunity to make a presentation to the Texas Lottery Commission regarding the protest of the terms of the formal competitive solicitation, and may be available to respond to questions by the Texas Lottery Commission.

(4) The staff attorney who made the written recommendation to the Texas Lottery Commission may also be present to respond to any questions by the Texas Lottery Commission.

(i) The Texas Lottery Commission will review the protest, the solicitation file, consider the oral argument, if any, the executive director's determination, including any reasoning that supports his determination, and his presentation, if any, the staff attorney's recommendation, and will make a written determination of the protest. The written determination on the protest may include a determination canceling the solicitation. The Texas Lottery Commission's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. The Texas Lottery Commission's determination shall be administratively final when issued.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200900824

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

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16 TAC §401.103

The Texas Lottery Commission (Commission) adopts new 16 TAC §401.103 (relating to Protests of Contract Award), with changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10402). Specifically: (1) on review, the Commission discovered an inconsistency between two terms used--"notice of contract execution" and "notice of contract award". The adopted version of the rule, at subsection (b), makes reference to "notice of contract award" in order to be consistent and avoid confusion; (2) this rule was intended to provide a protest procedure for all contract awards, not just formal competitive solicitations; therefore, on review, the Commission decided to remove the language limiting in §401.103(c) "made pursuant to a formal competitive solicitation" to more accurately reflect the intent of the rule and to avoid confusion; (3) also in subsection (c), "commission's" has been deleted and replaced with "office of the general counsel's"; (4) On review, the Commission discovered that at §401.103(c), a successful bidder could file a response to the protest, and then later in subsection (g) they could file a response to the director of administration's decision. However, there was not a provision in the proposed version of the rule for the successful bidder to file a response to the executive director's decision. The adopted version of the rule, at subsection (g), has been modified by adding the language, "or of the executive director's determination", to allow a response by a successful bidder to the executive director's determination and by adding the phrase "notice of", for clarity; (5) At subsection (h) the language "the director of administration's determination, including any reasoning that supports the director of administration's determination," has been added; and (6) At subsection (k), the language, "determination, including any reasoning that supports his determination, his" has been added, and the language, "parties to the protest proceedings" replaces the phrase "affected parties." The new rule is adopted concurrently with the repeal of 16 TAC §401.103 (relating to Protests of Contract Award).

The purpose of the new rule is to provide for a timely, efficient, and effective protest procedure to contract awards; to recognize and allow some protests to be resolved at the staff level, or executive director level, yet still provide a path for protestants to carry their protests directly to the Commissioners of the Texas Lottery Commission, where appropriate; to provide for a member of the legal staff who has not been involved in the procurement process to provide factual and legal advice and recommendation to the Commissioners; and to clarify and conform the protest process to applicable law and practice.

The anticipated public benefit of the adopted new rule will be that the rule provides ease and efficiency to the vendor community to protest the agency's award of contracts; and will conform the agency rules to the statutory requirements and agency practices.

The Commission received no comments during the public comment period.

The new rule is adopted under Texas Government Code, §466.015, which authorizes the Commission to adopt rules governing the operation of the lottery; and under Texas Government Code §466.101 which authorizes the executive director to adopt procedures for the procurement decisions of the Commission. The new rule is also adopted under Texas Government Code, §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

§401.103. Protests of Contract Award.

(a) Any bidder or proposer aggrieved by a contract award may protest the agency's action to the director of administration. If the director of administration cannot resolve the protest, the aggrieved party may appeal the director of administration's decision to the executive director. If the executive director cannot resolve the protest, the aggrieved party may appeal the executive director's decision to the Texas Lottery Commission. Irrespective of the foregoing provision and the following processes, at any time, the executive director may refer the protest directly to the Texas Lottery Commission for determination. The procedures applicable to an appeal to the commission will then apply.

(b) A protest of any contract award must be filed, in writing, with the commission's general counsel within 72 hours after receipt of notice of contract award. A copy must be delivered to the successful bidder or proposer at the same time that the protest or supplement is delivered to the agency. The stamp affixed by the office of the general counsel shall determine the time and date of filing. If the protest is filed by facsimile transmission, the quality of the original hard copy shall be clear and dark enough to transmit legibly and it shall be the sender's sole responsibility to ensure complete, timely, and legible delivery to the office of the general counsel and to the successful bidder or proposer. A protest not filed timely will not be considered, and the protestant will be so notified in writing by the commission's general counsel. A protestant may supplement its filed protest. The deadline to supplement is 5 p.m. central time, 10 days after notice of contract award.

(c) In the event of a protest of a contract award, the successful proposer(s) may file a written response to the protest within 72 hours after the office of the general counsel's receipt of the protest or any supplemental filing. The stamp affixed by the office of the general counsel shall determine the time and date of filing. If the response is filed by facsimile transmission, the quality of the original hard copy shall be clear and dark enough to transmit legibly and it shall be the sender's sole responsibility to ensure complete, timely, and legible delivery to the office of the general counsel. Responses not filed timely will not be considered, and the respondent will be so notified in writing by the commission's general counsel.

(d) To be considered, a protest must contain:

(1) a specific identification of the statutory provision, rule provision, or procurement procedure allegedly violated;

(2) a brief statement of the relevant facts;

(3) an identification of the issue or issues to be resolved;

(4) arguments and authorities in support of the protest;

(5) an affidavit that the contents of the protest are true and correct; and

(6) a certification that a copy of the protest has been served on the successful proposer(s).

(e) In the event of a timely filed protest of a contract award, the executive director will be notified and may abate the award of the contract until the protest is finally resolved.

(f) The director of administration will review the protest, and the contract award file, and any responses; and will make a written determination of the protest. The written determination on the protest may include a determination to cancel the award of the contract. The director of administration's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. An appeal of the determination of the director of administration of any protest must be filed, in writing, with the commission's general counsel by 5 p.m. of the next business day after issuance of the written determination. The stamp affixed by the office of the general counsel shall determine the time and date of filing.

(g) In the event of an appeal of the director of administration's determination, or of the executive director's determination, the successful proposer(s) may file a written response to the appeal within 24 hours after notice of the commission's receipt of the appeal. The stamp affixed by the office of the general counsel shall determine the time and date of filing. If the response is filed by facsimile transmission, the quality of the original hard copy shall be clear and dark enough to transmit legibly and it shall be the sender's sole responsibility to ensure complete, timely, and legible delivery to the office of the general counsel. Responses not filed timely will not be considered, and the respondent will be so notified in writing by the commission's general counsel.

(h) On appeal of the director of administration's determination, the executive director will review the protest, and the contract award file, and any responses, the director of administration's determination, including any reasoning that supports the director of administration's determination, and will make a written determination of the protest. The written determination on the protest may include a determination abating the award of the contract. The executive director's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. An appeal to the Texas Lottery Commission of the determination of the executive director of any protest must be filed, in writing, with the commission's general counsel by 5 p.m. of the next business day after issuance of the written determination. The stamp affixed by the office of the general counsel shall determine the time and date of filing.

(i) On timely receipt of the protest and any response, the general counsel will appoint a staff attorney who has not participated in the decision to award the contract to evaluate the protest and any response. The staff attorney will make a written recommendation to the Texas Lottery Commission, including proposed findings of fact and conclusions of law.

(j) The Texas Lottery Commission, at its discretion, may allow oral argument by the protestant and the successful bidder or proposer. The following procedure will be followed if the Texas Lottery Commission grants oral argument:

(1) Each oral argument may be limited in time as deemed appropriate by the Texas Lottery Commission;

(2) Each oral argument will be based solely on the written protest;

(3) The executive director may be present, have the opportunity to make a presentation to the Texas Lottery Commission regarding the protest of the contract award, and may be available to respond to questions by the Texas Lottery Commission;

(4) The staff attorney who made the written recommendation to the Texas Lottery Commission may also be present to respond to any questions by the Texas Lottery Commission.

(k) The Texas Lottery Commission will review the protest, the contract award file, any responses, consider the oral argument, if any, the executive director's determination, including any reasoning that supports his determination, his presentation, and the staff attorney's recommendation. The Texas Lottery Commission will make a written determination of the protest, including findings of fact and conclusions of law. The written determination may include a determination voiding the contract or sustaining the contract. The Texas Lottery Commission's written determination will be served, by facsimile, on the protestant and all parties to the protest proceedings. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. The Texas Lottery Commission's determination shall be administratively final when issued.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2009.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

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CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.409

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.409 (Amendment for Change of Premises or Occasions Due to Lease Termination or Abandonment), with changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10404). Specifically, the changes include: (1) deleting subsection (a)(3); (2) deleting "with the intention of never again conducting bingo" at subsection (b); (3) replacing "provided" with "sent" in subsections (c)(2) and (3); (4) adding "or other facts that could lead a reasonable person to conclude that the licensed authorized organization has abandoned its premises, day(s), and time(s)" to subsection (c)(4)(A); (5) adding "certified" before "statements" in subsection (c)(4)(B); (6) deleting "abandoned the premises" and replacing it with "ceased or will cease conducting bingo" to subsection (c)(5); (7) reorganizing subsection (e) for clarity and adding "relating to abandonment" and "no later than ten calendar days after the date an application relating to lease termination has been filed with the Commission or"; (8) creating subsection (f) as a result of reorganizing subsection (e) and renumbering accordingly; (9) adding "may conduct bingo at the new premises or during the new bingo occasion until the Commission acts on the application. In such instance, the licensed authorized organization:" to newly renumbered subsection (g); (10) replacing "must" with "should", and replacing "intent to begin" with "commencement of the" at newly renumbered subsection (g)(1); and (11) deleting "The applicant licensed authorized organization" and adding "applied for" to newly renumbered subsection (g)(2).

The purpose of the new rule is to clarify the process and timelines for licensed authorized organizations and commercial lessors when submitting an amendment application for a change in bingo premises or occasion due to lease termination or abandonment.

A public comment hearing was held on January 21, 2009. A representative from the Bingo Interest Group was present and commented against the new rule as proposed. The Commission received no written comments during the public comment period.

Comment: Regarding subsection (a)(3), the statute does not limit the time period during which a person may file an application when an organization ceases to conduct bingo. Subsection (a)(3) should be deleted.

Agency Response: The Commission agrees and has deleted proposed subsection (a)(3).

Comment: The totality of subsections (b) and (c) seems to require showing the intention of a third party which would be difficult. The language needs to be reworked.

Agency Response: The Commission agrees and has deleted from subsection (b) the language "with the intention of never again conducting bingo" to remove any requirement of showing intention. In addition, additional language has been added to (c)(4)(A) to recognize other facts that could lead a reasonable person to conclude that the licensed authorized organization has abandoned it licensed premises, day(s), and time(s).

Comment: Subsection (c) needs to be modified to indicate that the applicants must have made a reasonable effort to give notice rather than to have "provided" notice to the organization that has or will cease conducting bingo. If people do not want to be found, they won't be found.

Agency Response: The agency agrees and has substituted the word "sent" for "provided" in subsection (c).

Comment: Suggest in subsection (c)(5) that "abandoned" be changed to "ceased or will cease" to make it applicable to both abandonment and termination.

Agency Response: The agency agrees and has changed "abandoned" to "ceased or will cease."

Comment: Subsection (e) should be written to be consistent with the Bingo Enabling Act, Texas Occupations Code, §2001.108(b) and (c).

Agency Response: The agency agrees and has revised subsection (e) to clearly recognize different time requirements for the Commission to act on applications resulting from abandonment and lease termination.

Comment: Paragraphs (1) and (2) of subsection (f) do not appear to be related to subsection (f) and should be renumbered.

Agency Response: The agency agrees and has renumbered proposed paragraphs (1) and (2) of subsection (f) and the following subsections.

Comment: The statute does not require any notice to the Commission prior to the applicant's beginning conduct of bingo if the Commission fails to timely act. Subsection (f) should be rewritten to correspond to the statute in this regard.

Agency Response: The agency agrees and has modified subsection (f) by changing "must" to "should" submit written notification to the Commission and adding language to clarify that the licensed authorized organization may conduct bingo as applied for until the Commission acts on the application.

Comment: I suggest adding language to the rule that implements Bingo Enabling Act, Texas Occupations Code, §2001.108(e)--"The Commission on request will grant applications for temporary licenses"--assuming there is a gap.

Agency Response: The Commission disagrees. This is addressed in existing 16 TAC §402.401(d)(6), relating to temporary license.

The new rule is adopted under Texas Occupations Code, §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code, §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

§402.409. Amendment for Change of Premises or Occasions Due to Lease Termination or Abandonment.

(a) An application for a license amendment filed jointly by a licensed authorized organization and a commercial lessor in accordance with Texas Occupations Code, §2001.108 must be:

(1) for the same premises, day(s), and time(s) that another licensed authorized organization that has ceased or will cease to conduct bingo is licensed to conduct bingo; and

(2) on a form prescribed by the Commission.

(b) For purposes of this section, "abandonment" means a licensed authorized organization's relinquishment of its licensed playing day(s) and time(s) at a bingo premises on the day(s) and time(s) under the license and lease agreement then in effect.

(c) The application described in subsection (a) of this section must include:

(1) notice to the Commission of the abandonment of licensed playing day(s) and time(s) or premises or lease termination on the appropriate form prescribed by the Commission;

(2) a copy of written notification sent by the commercial lessor to the currently licensed authorized organization stating that the organization's lease has been terminated, if applicable;

(3) a statement that the applicants have sent a copy of the application to the licensed authorized organization ceasing to conduct charitable bingo;

(4) additional supporting documentation related to the lease termination or abandonment of the premises, such as:

(A) correspondence from the licensed authorized organization that abandoned the time or premises indicating intent to abandon or other facts that could lead a reasonable person to conclude that the licensed authorized organization has abandoned its licensed premises, day(s), and time(s); and

(B) certified statements from persons with direct knowledge of pertinent events.

(5) the license of the organization that has ceased or will cease conducting bingo, if available.

(d) An application under this section is considered filed on the date the completed application and all documents listed in subsection (c) of this section are received by the Commission.

(e) The Commission will act on a joint application filed under this section:

(1) no later than ten calendar days after the date an application relating to abandonment is filed with the Commission; or

(2) no later than ten calendar days after the date an application relating to lease termination has been filed with the Commission or the effective date of the licensed authorized organization's lease termination, whichever is later.

(f) The Commission will act on a joint application filed under this section and notify the applicants by:

(1) requesting additional information;

(2) denying the application; or

(3) issuing an amended license.

(g) If the Commission fails to act timely on an application submitted in accordance with Texas Occupations Code, §2001.108 and this section, the applicant licensed authorized organization may conduct bingo at the new premises or during the new bingo occasion until the Commission acts on the application. In such instance, the licensed authorized organization:

(1) should submit written notification to the Commission of its commencement of the conduct of bingo for the specified date(s), time(s), and premises identified on the pending application.

(2) must conspicuously display a copy of the written notification to the Commission at the applied for premises at which bingo is conducted at all times during the conduct of bingo.

(h) The applicant licensed authorized organization must immediately cease conducting bingo for the specified day(s), time(s), and premises identified on the application upon receipt of written notification that the Commission denies the application or requests more information.

(i) The denial of an application under this section does not affect a licensed authorized organization's existing annual license.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

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16 TAC §402.412

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.412 (Signature Requirements), without changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10405).

The purpose of the new rule is to provide the Commission's requirements for a valid signature and to clarify the signature requirements for forms prescribed by the Commission.

A public comment hearing was held on January 21, 2009. A representative from the Bingo Interest Group was present and commented in favor of the new rule. No written comments were received during the public comment period.

The new rule is adopted under Texas Occupations Code, §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code, §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kimberly L. Kiplin
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16 TAC §402.424

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.424 (Amendment of a License by Telephone or Facsimile), without changes to the proposed text as published in the December 26, 2008, issue of the *Texas Register* (33 TexReg 10406).

The purpose of the new rule is to set forth for licensees the process and timelines to follow when submitting by telephone or facsimile an amendment to a license to conduct bingo.

A public comment hearing was held on January 21, 2009. A representative from the Bingo Interest Group was present and commented in favor of the new rule. No written comments were received during the public comment period.

The new rule is adopted under Texas Occupations Code, §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Texas Government Code, §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS

SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §1.141

The Texas Board of Architectural Examiners adopts an amendment to §1.141 of Chapter 1, Subchapter H, concerning professional conduct of architects. The proposal to amend this rule was published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9852). The amendment is being adopted without changes.

The amendment corrects a cross-reference to a statute in the rule. As amended the rule refers to Chapter 1051, Texas Occupations Code.

The agency received no comments concerning the proposal to amend this rule.

The amendment is adopted pursuant to §1051.202 and §1051.208, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, and which require the board to establish standards of conduct for persons regulated by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8544

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22 TAC §1.149

The Texas Board of Architectural Examiners adopts an amendment to §1.149 of Chapter 1, Subchapter H, concerning criminal convictions. The proposal to amend this rule was published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9852). The amendment is being adopted without changes. The amendment updates cross-references to laws within the rule to reflect the codification of those laws.

The agency received no comments concerning the proposal to amend this rule.

The amendment is adopted pursuant to §1051.202 and §1051.207, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and require the board to adopt rules to comply with Chapter 53, Texas Occupations Code, relating to the conviction of license holders for criminal conduct.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-8544

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CHAPTER 3. LANDSCAPE ARCHITECTS
SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §3.141

The Texas Board of Architectural Examiners adopts an amendment to §3.141 of Chapter 3, Subchapter H, concerning professional conduct of landscape architects. The proposal to amend this rule was published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9853). The amendment is being adopted without changes.

The amendment corrects an obsolete cross-reference to the agency's enabling legislation in the rule. As amended the rule refers to Chapters 1051 and 1052, Texas Occupations Code.

The agency received no comments concerning the proposal to amend this rule.

The amendment is adopted pursuant to §1051.202 and §1051.208, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, and which require the board to establish standards of conduct for persons regulated by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy L. Hendricks
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For further information, please call: (512) 305-8544

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22 TAC §3.149

The Texas Board of Architectural Examiners adopts an amendment to §3.149 of Chapter 3, Subchapter H, concerning criminal convictions. The proposal to amend this rule was published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9853). The amendment is being adopted without changes. The amendment updates cross-references to the board's enabling laws within the rule to reflect the codification of those laws.

The agency received no comments concerning the proposal to amend this rule.

The amendment is adopted pursuant to §1051.202 and §1051.207, Texas Occupations Code Annotated, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and requires the board to adopt rules to comply with Chapter 53, Texas Occupations Code, relating to the conviction of license holders for criminal conduct.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy L. Hendricks
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For further information, please call: (512) 305-8544

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CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER D. CERTIFICATION AND ANNUAL REGISTRATION

22 TAC §5.78

The Texas Board of Architectural Examiners adopts an amendment to §5.78 of Chapter 5, Subchapter D, concerning inactive status and the use of the title "emeritus interior designer." The proposal to amend this rule was published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9854). The amendment is being adopted without changes.

The amended rule limits the use of the emeritus title by inactive interior designers to those who are at least 65 years of age and who have been registered for at least 15 years and will continue to allow 65-year-old interior designers whose registrations are on inactive status (and who therefore may not practice) to use the emeritus title until they have been registered for 20 years at which time they may change their registration to emeritus status.

The agency received no comments concerning the proposal to amend this rule.

This amendment is adopted pursuant to §1051.202 and §1051.355, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and to establish a procedure by which a person may place her or his certificate of registration on inactive status in which status the person may not engage in an activity regulated by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy L. Hendricks
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Texas Board of Architectural Examiners
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SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §5.151

The Texas Board of Architectural Examiners adopts an amendment to §5.151 of Chapter 5, Subchapter H, concerning professional conduct of interior designers. The proposal to amend this rule was published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9855). The amendment is being adopted without changes.

The amendment updates a cross-reference within the rule to the board's enabling laws to reflect the codification of those laws.

The agency received no comments concerning the proposal to amend this rule.

The amendment is adopted pursuant to §1051.202 and §1051.208, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with general authority to promulgate rules and which require the board to establish standards of conduct for persons regulated by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy L. Hendricks
Executive Director
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For further information, please call: (512) 305-8544

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22 TAC §5.158

The Texas Board of Architectural Examiners adopts an amendment to §5.158 of Chapter 5, Subchapter H, concerning criminal convictions. The proposal to amend this rule was published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9855). The amendment is being adopted without changes. The amendment updates cross-references to laws within the rule to reflect the codification of those laws.

The agency received no comments concerning the proposal to amend this rule.

The amendment is adopted pursuant to §1051.202 and §1051.207, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and require the board to adopt rules to comply with Chapter 53, Texas Occupations Code, relating to the conviction of license holders for criminal conduct.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS

SUBCHAPTER F. EDUCATION, EXPERIENCE, EDUCATIONAL PROGRAMS, TIME PERIODS AND TYPE OF LICENSE

22 TAC §535.64

The Texas Real Estate Commission (TREC) adopts amendments to §535.64 concerning Accreditation of Schools and Approval of Courses and Instructors and adopts by reference a revised course application form without changes to the proposed text as published in the January 2, 2009, issue of the *Texas Register* (34 TexReg 25) and will not be republished. Form ED 3-1, Course Application, has been revised to obtain additional information regarding the type of course, the provider's contact information, the delivery format, a sample course completion certificate, approval from the Distance Learning Certification Center for online courses, and a permission letter for courses using another provider's materials. The amendments also update a reference to Form ED 7-1, Instructor Manual Guidelines, which erroneously referred to an outdated version of the form, and a reference to the instructor approval requirements, which was not updated when the lettering of the subsections changed at the time of previous amendments to the section.

The reasoned justification for the amendments is greater clarity for the public regarding application requirements as well as increased efficiency for agency staff because of reduced need to request follow-up materials.

No comments were received regarding the amendments as proposed.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 2, 2009.

TRD-200900909
Devon V. Bijansky
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Texas Real Estate Commission
Effective date: March 22, 2009
Proposal publication date: January 2, 2009
For further information, please call: (512) 465-3900

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.65

The Commissioner of Insurance adopts the repeal of §7.65, concerning the requirements for filing the 2002 quarterly and 2002 annual statements, other reporting forms, and electronic data filings with the Department and the National Association of Insurance Commissioners (NAIC). The repeal is adopted without changes to the proposed text published in the January 2, 2009, issue of the *Texas Register* (34 TexReg 27).

REASONED JUSTIFICATION. The repeal of the obsolete section is necessary to permit the simultaneous adoption of new §7.65, concerning filing requirements for the 2008 annual statements, the 2009 quarterly statements, other reporting forms, and electronic data filings with the Department and the National Association of Insurance Commissioners. The adoption notice of the new §7.65 is also published in this issue of the *Texas Register.* The 2002 reporting forms and other requirements mandated under the repealed section have been filed and the due dates for filing the 2002 annual statements, 2002 quarterly statements, and other reports have passed. Therefore, the repealed section is no longer necessary.

HOW THE SECTION WILL FUNCTION. The adoption of the repeal will result in the removal of an obsolete provision from the Texas Administrative Code, and permit the adoption of new §7.65. Adopted new §7.65 specifies the requirements for filing the 2008 annual statements, the 2009 quarterly statements, other reporting forms, and electronic data filings with the Department and the NAIC.

SUMMARY OF COMMENTS. The Department did not receive any comments on the proposed repeal.

STATUTORY AUTHORITY. The repeal of the section is adopted under the following provisions of the Insurance Code. Sections 802.001 - 802.003 and 802.051 - 802.056 authorize the Commissioner to make changes in the forms of the annual statements required of insurance companies of any kind, as shall seem best adapted to elicit a true exhibit of their condition and methods of transacting business and require certain insurers to make filings with the National Association of Insurance Commissioners. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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28 TAC §7.65

The Commissioner of Insurance adopts new §7.65, concerning requirements for the filing of the 2008 annual statements, the 2009 quarterly statements, other reporting forms, and electronic data filings with the Department and the National Association of Insurance Commissioners. The new section is adopted with changes to the proposed text published in the January 2, 2009, issue of the *Texas Register* (34 TexReg 27).

REASONED JUSTIFICATION. The new section is necessary to specify the filing requirements for insurers and other regulated entities for the 2008 annual statement, the 2009 quarterly statements, other reporting forms, and electronic data filings, with the Department and the National Association of Insurance Commissioners (NAIC). The requirements are applicable to insurers, health maintenance organizations (HMOs), nonprofit legal service corporations, Texas Health Insurance Risk Pool, Texas Fair Plan Association and Texas Windstorm Insurance Association, and certain other regulated entities authorized to do the business of insurance in this state. These insurers, HMOs, and other regulated entities are referred to collectively as "carriers" in this adoption. The adopted requirements include the reporting forms and instructions to be used by carriers when reporting their year-end 2008 and the first three quarters of the 2009 calendar year financial condition and business operations and activities. These reporting forms are adopted by reference. The adopted requirements also include the requirement that carriers file the completed reporting forms, including diskettes or electronic filings, with the Department and/or the NAIC as directed in the adopted new section. The reporting forms include the: (i) 2008 annual statement blanks, (ii) 2009 quarterly statement blanks, (iii) Schedule SIS, (iv) management discussion and analysis, (v) supplemental compensation exhibit, (vi) overhead assessment exemption form for insurance company examination expenses, (vii) analysis of surplus, (viii) separate accounts, (ix) supplemental information for county mutuals and HMOs, (x) release of contributions, (xi) reserve summary, (xii) inventory of

insurance in force, and (xiii) summary of insurance in force. The information provided on the completed forms is necessary to enable the Department to monitor the solvency, business activities, and statutory compliance of the carriers. The adopted requirements also specify the dates by which certain reports are to be filed. The adopted new section specifies that the term "Texas Edition" refers to the blanks and forms adopted by the Commissioner. Most of the adopted forms have been promulgated by the NAIC and are used in other states. The use of these forms promotes uniformity and efficiency in the regulation of insurance companies and other entities regulated by the Department. The required documents will provide financial information to the public and regulatory agencies. The information will be used by the Department to monitor the financial condition of carriers to ensure financial solvency and compliance with applicable laws and accounting requirements.

Simultaneously with the adoption of this new section, the Department is adopting the repeal of existing §7.65, which is also published in this issue of the *Texas Register.*

The Department has made non-substantive changes to the proposed text as published. None of the changes, however, materially alter issues raised in the proposed rule, introduce new subject matter, or affect persons other than those previously on notice. The Department has determined that non-substantive changes are necessary in the following provisions as proposed.

Section 7.65(a) as proposed contains an inaccurate reference to "2009 quarterly statement blanks" that should be "2009 quarterly statements." The adopted subsection reads "(a) Scope. This section specifies the requirements for insurers and other regulated entities for filing the 2008 annual statement, the 2009 quarterly statements, other reporting forms, and electronic data filings, ..." The language is in lieu of the proposed language reading "(a) Scope. This section specifies the requirements for insurers and other regulated entities for filing the 2008 annual statement, the 2009 quarterly statement blanks, other reporting forms, and electronic data filings, ..."

Section 7.65(d) as proposed contains five inaccurate references to 2008 that should be to 2009 in reference to health quarterly statements; health quarterly statement instructions; life, accident and health quarterly statements; and life, accident and health quarterly statement instructions. Adopted §7.65(d) in pertinent part reads: "Insurers described under this subsection may elect to file on the 2008 Health Annual Statement for year-end 2008, and on the 2009 Health Quarterly Statement for the three quarters of 2009, if the insurer passes the Health Statement Test as outlined in the "2008 Annual Statement, Health Instructions." If a reporting entity qualifies under this subsection to use the 2008 Health Annual Statement, it must continue to use that annual statement for a minimum of three years or obtain written approval from the department to change to another type of annual statement. Insurers filing the 2008 Life, Accident and Health Annual Statement, the 2009 Life, Accident and Health Quarterly Statements, and the supplemental forms and reports identified in these subsections shall complete filings in accordance with the "2008 Annual Statement Instructions, Life, Accident and Health," and the "2009 Quarterly Statement Instructions, Life, Accident and Health," as applicable. Life insurers meeting the test set forth in this subsection to file the 2008 Health Annual Statement and the supplemental forms and reports identified in these subsections shall complete filings in accordance with the "2008 Annual Statement Instructions, Health," and the "2009 Quarterly Statement Instructions, Health," as applicable. . . ." (emphasis added)

A non-substantive change is also necessary in §7.65(d)(1)(L) as adopted to correct a typographical error in the Insurance Code citation. Section 7.65(d)(1)(L) as proposed includes a reference to "the Insurance Code §451.151." This reference is corrected in adopted §7.65(d)(1)(L) to read "the Insurance Code §401.151."

In §7.65(e) as adopted, it is necessary to delete a redundant and inaccurate reference to "any Mexican casualty insurance company licensed under the Insurance Code Chapter 984." Section 7.65(e) specifies requirements for property and casualty insurers but does not specify the requirements for Mexican casualty insurance companies licensed under the Insurance Code Chapter 984. Section 7.65(l), which is adopted without any change to the proposed requirements, specifies requirements for these types of insurers.

A nonsubstantive change is also necessary in §7.65(j) to correct a reference to the "2007 calendar year" that should be a reference to the "2008 calendar year." Adopted §7.65(j) is revised to read in pertinent part: "Each statewide mutual assessment association, local mutual aid association, mutual burial association and exempt association shall complete and file the following blanks and forms for the 2008 calendar year with the department only, on or before April 1, 2009: . . . ."

Additional nonsubstantive changes have been made to the proposed text in §7.65(g) and (h) to add inadvertently omitted quotation marks in §7.65(g) and (h) as adopted.

HOW THE SECTION WILL FUNCTION.

§7.65(a). Scope. Adopted §7.65(a) provides that the purpose of the section is to specify the requirements for insurers and other regulated entities (carriers) for filing the 2008 annual statement, the 2009 quarterly statements, other reporting forms, and electronic data filings, with the Department and the National Association of Insurance Commissioners (NAIC). Carriers are required to submit the filings in order to report information concerning their financial condition and business operations. Adopted §7.65(a) specifies the carriers to which the section applies. Adopted §7.65(a) also addresses the necessary reporting forms, including: (i) the adoption by reference of the 2008 annual statement blanks, the 2009 quarterly statement blanks, and the related instruction manuals published by the NAIC, and other supplemental reporting forms specified in the section; (ii) how the forms may be obtained; and (iii) how the forms can be filed.

§7.65(b). Definition. Adopted §7.65(b) provides that the term "Texas Edition" refers to the blanks and forms promulgated by the Commissioner.

§7.65(c). Conflicts with other laws. Adopted §7.65(c) specifies the hierarchy in the applicability of laws in the event of a conflict between the Insurance Code, this new section, other Department regulations, and the NAIC instructions specified in the new section.

§7.65(d) - (l). Filing requirements for the various types of carriers. Adopted §7.65(d) - (l) specify the forms, instructions and filing requirements for the various types of carriers: subsection (d): life; life and accident; life and health; accident; accident and health; mutual life; or life, accident and health insurance company; stipulated premium company; group hospital service corporation, including the Texas Health Insurance Risk Pool; subsection (e): fire, fire and marine, general casualty, fire and

casualty, or U.S. branch of an alien insurer, county mutual insurance company, mutual insurance company other than life, Lloyd's plan, reciprocal or inter insurance exchange, domestic risk retention group, life insurance company that is licensed to write workers' compensation, any farm mutual insurance company that filed a property and casualty annual statement for the 2007 calendar year or had gross written premiums in 2008 in excess of $6 million, domestic joint underwriting association, the Texas Mutual Insurance Company, the Texas Windstorm Insurance Association, and the Texas FAIR Plan Association; subsection (f): fraternal benefit societies; subsection (g): title insurers; subsection (h): health maintenance organizations; subsection (i): farm mutual insurers not subject to the provisions of §7.65(e); subsection (j): statewide mutual assessment associations, local mutual aid associations, mutual burial associations, and exempt associations; subsection (k): nonprofit legal service corporations; and subsection (l): Mexican casualty insurance companies licensed under the Insurance Code Chapter 984.

§7.65(m). Other financial reports. Adopted §7.65(m) provides that the Department may request financial reports other than those specified in the section.

SUMMARY OF COMMENTS. The Department did not receive any comments on the proposed new section.

STATUTORY AUTHORITY. The new section is adopted under the following provisions of the Insurance Code. Sections 802.001 - 802.003 and 802.051 - 802.056 authorize the Commissioner to make changes in the forms of the annual statements required of insurance companies of any kind, as shall seem best adapted to elicit a true exhibit of their condition and methods of transacting business and require certain insurers to make filings with the National Association of Insurance Commissioners. Chapters 2201, 2210 and 2211, and §§841.255, 842.003, 842.201, 842.202, 843.151, 843.155, 861.254, 861.255, 862.001, 862.003, 882.001, 882.003, 883.002, 883.204, 884.256, 885.401, 885.403 - 885.406, 887.009, 887.060, 887.401 - 887.407, 911.001, 911.304, 912.002, 912.201 - 912.203, 912.301, 941.252, 942.201, 961.002, 961.003, 961.052, 961.202, 982.004, 982.251 - 982.254, 982.004, 982.101, 982.103, 984.101 - 984.103, 984.153, 984.201, 984.202, 1301.009, 1506.057, 2551.001, and 2551.152 require the filing of financial reports and other information by insurers and other regulated entities and provide specific rulemaking authority to the Commissioner relating to those insurers and other regulated entities. Sections 982.001, 982.002, 982.004, 982.052, 982.102 - 982.104, 982.106, 982.108, 982.110 - 982.112, 982.201 - 982.204, 982.251 - 982.255, and 982.302 - 982.306 specify the conditions under which foreign insurers are permitted to do business in this state and require foreign insurers to comply with the provisions of the Insurance Code. Sections 844.001 - 844.005, 844.051 - 844.054, and 844.101 authorize the Commissioner to adopt rules to implement the regulation of nonprofit health corporations holding a certificate of authority under the Insurance Code, Title 2, Chapter 844. Section 421.001 requires insurers to establish adequate reserves and requires the adoption of each current formula recommended by the National Association of Insurance Commissioners for establishing reserves applicable to each line of insurance. Section 32.041 requires the Department to furnish the statement blanks and other reporting forms necessary for companies to comply with the filing requirements. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§7.65. Requirements for Filing the 2008 Annual Statements, the 2009 Quarterly Statements, Other Reporting Forms, and Electronic Data Filings with the Texas Department of Insurance and the NAIC.

(a) Scope. This section specifies the requirements for insurers and other regulated entities for filing the 2008 annual statement, the 2009 quarterly statements, other reporting forms, and electronic data filings, with the department and the National Association of Insurance Commissioners (NAIC) necessary to report information concerning the financial condition and business operations and activities of insurers. This section applies to all insurers and certain other regulated entities authorized to do the business of insurance in this state and includes, but is not limited to, life insurers; accident insurers; life and accident insurers; life and health insurers; accident and health insurers; life, accident and health insurers; mutual life insurers; stipulated premium insurers; group hospital service corporations; fire insurers; fire and marine insurers; U.S. branches of alien insurers; Mexican casualty insurers; general casualty insurers; fire and casualty insurers; mutual insurers other than life; statewide mutual assessment companies; local mutual aid associations; mutual burial associations; exempt associations; county mutual insurers; Lloyd's plans; reciprocal and inter-insurance exchanges; domestic risk retention groups; domestic joint underwriting associations; title insurers; fraternal benefit societies; farm mutual insurers; health maintenance organizations; nonprofit health corporations; nonprofit legal services corporations; the Texas Health Insurance Risk Pool; the Texas Mutual Insurance Company; the Texas Windstorm Insurance Association; and the Texas FAIR Plan Association. The commissioner adopts by reference the 2008 annual statement blanks, the 2009 quarterly statement blanks, and the related instruction manuals published by the NAIC, and other supplemental reporting forms specified in this section. The forms are available from the Texas Department of Insurance, Financial Analysis Division, Mail Code 303-1A, P.O. Box 149104, Austin, Texas 78714-9104. The NAIC annual and quarterly statement blanks and other NAIC supplemental reporting forms can be printed or filed electronically using annual statement software available from vendors. Insurers and other regulated entities shall properly report to the department and the NAIC by completing, in accordance with applicable instructions, the appropriate hard copy annual and quarterly statement blanks, other reporting forms, and electronic data filings.

(b) Definition. In this section "Texas Edition" refers to the blanks and forms promulgated by the commissioner.

(c) Conflicts with other laws. In the event of a conflict between the Insurance Code, any currently existing department rule, form, instructions, or any specific requirement of this section and the NAIC instructions listed in this section, the Insurance Code, the department rule, form, instruction, or the specific requirements of this section shall take precedence and in all respects control.

(d) Filing requirements for life, accident and health insurers. Each life; life and accident; life and health; accident; accident and health; mutual life; or life, accident and health insurance company; stipulated premium company; group hospital service corporation; and the Texas Health Insurance Risk Pool shall complete and file the blanks, forms, or electronic data filings as directed in this subsection. This subsection does not apply to entities licensed as health maintenance organizations under the Insurance Code Chapter 843. Insurers specified in this subsection and engaged in business authorized under the Insurance Code Chapter 843 may have additional reporting requirements under subsection (h) of this section. Insurers described under this subsection may elect to file on the 2008 Health Annual Statement for year-end 2008, and on the 2009 Health Quarterly Statement for the three quarters of 2009, if the insurer passes the Health Statement Test

as outlined in the "2008 Annual Statement, Health Instructions." If a reporting entity qualifies under this subsection to use the 2008 Health Annual Statement, it must continue to use that annual statement for a minimum of three years or obtain written approval from the department to change to another type of annual statement. Insurers filing the 2008 Life, Accident and Health Annual Statement, the 2009 Life, Accident and Health Quarterly Statements, and the supplemental forms and reports identified in these subsections shall complete filings in accordance with the "2008 Annual Statement Instructions, Life, Accident and Health," and the "2009 Quarterly Statement Instructions, Life, Accident and Health," as applicable. Life insurers meeting the test set forth in this subsection to file the 2008 Health Annual Statement and the supplemental forms and reports identified in these subsections shall complete filings in accordance with the "2008 Annual Statement Instructions, Health," and the "2009 Quarterly Statement Instructions, Health," as applicable. The electronic filings of these forms or reports with the NAIC shall be in accordance with the NAIC data specifications and instructions for electronic filing and shall include PDF format filing. The filings for insurers described in this subsection are as follows:

(1) Domestic insurer reports and forms in paper copy to be filed only with the department as follows:

(A) 2008 Life, Accident and Health Annual Statement, including the printed investment schedule detail, due on or before March 1, 2009 (stipulated premium companies, April 1, 2009);

(B) 2008 Life, Accident and Health Annual Statement of the Separate Accounts for the 2008 calendar year (required of companies maintaining separate accounts), due on or before March 1, 2009;

(C) 2009 Life, Accident and Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2009. A Texas stipulated premium company, unless specifically requested to do so by the department, is not required to file quarterly data filings with the NAIC if it meets all three of the following conditions:

(i) it is authorized to write only life insurance on its certificate of authority;

(ii) it collected premiums in the prior calendar year of less than $1 million; and

(iii) it had a profit from operations in the prior two calendar years;

(D) 2008 Health Annual Statement, including the printed investment schedule detail, due on or before March 1, 2009 if the company qualifies as described in this subsection;

(E) 2009 Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2009 if the company qualifies as described in this subsection;

(F) All the paper copies of the annual and quarterly supplements prepared and filed on dates specified in the forms and instructions;

(G) Management's Discussion and Analysis, due on or before April 1, 2009;

(H) Statement of Actuarial Opinion, due on or before March 1, 2009 (stipulated premium companies, April 1, 2009). The actuarial opinion shall be prepared in accordance with paragraph (4) of this subsection;

(I) Schedule SIS, due on or before March 1, 2009. This filing is also required if filing a Health Annual Statement, as applicable;

(J) Supplemental Compensation Exhibit, due on or before March 1, 2009 (stipulated premium companies, April 1, 2009). This filing is also required if filing a Health Annual Statement, as applicable;

(K) The Texas Health Insurance Risk Pool shall file the 2008 Health Annual Statement, and the 2009 Quarterly Statements as follows:

(i) 2008 Health Annual Statement with only pages 1 - 6, and Schedule E Part 1, Part 2, and Part 3 to be completed and filed on or before March 1, 2009;

(ii) 2009 Health Quarterly Statements, with only pages 1 - 6, Schedule E, Part 1 - Cash, and Part 2 - Cash Equivalents to be completed and filed on or before May 15, August 15, and November 15, 2009; and

(iii) The Texas Health Insurance Risk Pool is not required to file any reports, diskettes, or electronic data filings with the NAIC.

(L) Texas Overhead Assessment Exemption Form (Texas Edition), due on or before March 1, 2009 (stipulated premium companies, April 1, 2009). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed; and

(M) Analysis of Surplus (Texas Edition) for life, accident and health insurers, due on or before March 1, 2009 (stipulated premium companies, April 1, 2009).

(2) Foreign companies filing only electronically with the NAIC and not filing a paper copy with the department shall file a signed jurat page with the department in lieu of filing the entire paper filing.

(3) Electronic filings with the NAIC by domestic and foreign insurers:

(A) 2008 Life, Accident and Health Annual Statement electronic filing and PDF filing, due on or before March 1, 2009 (stipulated premium companies, April 1, 2009);

(B) 2008 Life, Accident and Health Annual Statement of the Separate Accounts electronic filing and PDF filing, due on or before March 1, 2009;

(C) 2009 Life, Accident and Health Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2009. A Texas stipulated premium company, unless specifically requested to do so by the department, is not required to file quarterly electronic data filings with the NAIC if it meets all three of the following conditions:

(i) it is authorized to write only life insurance on its certificate of authority;

(ii) it collected premiums in the prior calendar year of less than $1 million; and

(iii) it had a profit from operations in the prior two calendar years.

(D) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for Schedule SIS and Supplemental Compensation Exhibit which are filed by domestic insurers only with the department in paper copy) due on the dates specified in the forms and instructions.

(4) Statement of Actuarial Opinion required by paragraph (1)(H) of this subsection shall be prepared in accordance with the following:

(A) Unless exempted, the Statement of Actuarial Opinion, attached to either the 2008 Life, Accident and Health Annual State-

ment or the 2008 Health Annual Statement, should follow the applicable provisions of §§3.1601 - 3.1608 of this title (relating to Actuarial Opinion and Memorandum Regulation).

(B) For those companies exempted from §§3.1601 - 3.1608 of this title, instructions 1 - 12, established by the NAIC, must be followed.

(C) Any company required by §3.4505(b)(3)(I) of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves) to opine on the application of X factors, shall attach this opinion to the 2008 Life, Accident and Health Annual Statement or the 2008 Health Annual Statement, as applicable.

(5) The commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC.

(6) A foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 shall file an Analysis of Surplus (Texas Edition) for life, accident and health insurers with the department, on or before March 1, 2009.

(e) Requirements for property and casualty insurers. Each fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, county mutual insurance company, mutual insurance company other than life, Lloyd's plan, reciprocal or inter insurance exchange, domestic risk retention group, life insurance company that is licensed to write workers' compensation, any farm mutual insurance company that filed a property and casualty annual statement for the 2007 calendar year or had gross written premiums in 2008 in excess of $6 million, domestic joint underwriting association, the Texas Mutual Insurance Company, the Texas Windstorm Insurance Association, and the Texas FAIR Plan Association shall complete and file the following blanks, forms, and diskettes or electronic data filings as described in this subsection. The forms and reports identified in this subsection shall be completed in accordance with the "2008 Annual Statement Instructions, Property and Casualty," and the "2009 Quarterly Statement Instructions, Property and Casualty," as applicable. The electronic filings with the NAIC shall be in accordance with the NAIC data specifications and instructions and shall include PDF format filing, as applicable. The filings for insurers described in this subsection are as follows:

(1) Domestic insurer reports and forms in paper copy to be filed only with the department as follows:

(A) 2008 Property and Casualty Annual Statement, due on or before March 1, 2009, including the printed investment schedule detail;

(B) 2009 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2009;

(C) 2008 Combined Property/Casualty Annual Statement, due on or before May 1, 2009. This statement is required only for those affiliated insurers that wrote more than $35 million in direct premiums as a group in calendar year 2008, as disclosed in Schedule T of the Annual Statement(s);

(D) All the paper copies of the annual and quarterly supplements prepared and filed on dates specified in the forms and instructions;

(E) The actuarial opinion submitted shall be prepared in accordance with the "2008 Annual Statement Instructions, Property and Casualty";

(F) Schedule SIS, due on or before March 1, 2009;

(G) Supplemental Compensation Exhibit, due on or before March 1, 2009;

(H) Texas Overhead Assessment Exemption Form (Texas Edition), due on or before March 1, 2009. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed;

(I) Texas Supplement for County Mutuals (Texas Edition) (required of Texas county mutual insurance companies only), due on or before March 1, 2009;

(J) Texas Supplemental "A" for County Mutuals (Texas Edition) (required of Texas county mutual insurance companies only), due on or before March 1, 2009;

(K) Analysis of Surplus (Texas Edition) for property and casualty insurers except Texas county mutual insurance companies, due on or before March 1, 2009;

(L) Actuarial Opinion Summary prepared in accordance with §7.9 of this title (relating to Examination of Actuarial Opinion for Property and Casualty Insurers);

(M) The Texas Windstorm Insurance Association shall complete and file the following:

(i) 2008 Property and Casualty Annual Statement, due on or before March 1, 2009;

(ii) 2009 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2009; and

(iii) Management's Discussion and Analysis, due on or before April 1, 2009.

(iv) The Texas Windstorm Insurance Association is not required to file any reports with the NAIC.

(N) The Texas FAIR Plan Association shall complete and file the following:

(i) 2008 Property and Casualty Annual Statement, due on or before March 1, 2009;

(ii) 2009 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2009;

(iii) Statement of Actuarial Opinion, due on or before March 1, 2009;

(iv) Actuarial Opinion Summary prepared in accordance with §7.9 of this title; and

(v) Management's Discussion and Analysis, due on or before April 1, 2009.

(vi) The Texas FAIR Plan Association is not required to file any reports with the NAIC.

(2) Foreign property and casualty insurers filing only electronically with the NAIC and not filing a paper copy with the department shall file a signed jurat page with the department in lieu of filing the entire paper filing.

(3) Electronic filings by domestic and foreign insurers to be filed with the NAIC:

(A) 2008 Property and Casualty Annual Statement electronic filing and PDF filing, due on or before March 1, 2009;

(B) 2009 Property and Casualty Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2009;

(C) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for electronic Schedule SIS and Supplemental Compensation Exhibit, required of domestic insurers only) due on the dates specified in the forms and instructions;

(D) Electronic combined insurance exhibit, due on or before May 1, 2009; and

(E) Combined annual statement electronic filing and PDF filing, due on or before May 1, 2009.

(4) The commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC.

(5) A foreign insurer that files an application with the department for approval of a policyholder dividend shall file an Analysis of Surplus (Texas Edition) for property and casualty insurers with the application.

(6) A foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 shall file an Analysis of Surplus (Texas Edition) for property and casualty insurers with the department, on or before March 1, 2009.

(f) Requirements for fraternal benefit societies. Each fraternal benefit society shall complete and file the following blanks, forms, and electronic data filings for the 2008 calendar year, and the first three quarters for the 2009 calendar year. The forms and reports identified in this subsection shall be completed in accordance with the "2008 Annual Statement Instructions, Fraternal," and the "2009 Quarterly Statement Instructions, Fraternal," as applicable. The electronic data filings with the NAIC shall be in accordance with the NAIC data specifications and instructions and shall include PDF format filing. The filings for insurers described in this subsection are as follows:

(1) Domestic insurer reports and forms in paper copy to be filed only with the department, as follows:

(A) 2008 Fraternal Annual Statement, including the printed investment schedule detail, due on or before March 1, 2009;

(B) 2008 Fraternal Annual Statement of the Separate Accounts (required of companies maintaining separate accounts), due on or before March 1, 2009;

(C) 2009 Fraternal Quarterly Statements, due on or before May 15, August 15, and November 15, 2009;

(D) All the paper copies of the annual and quarterly supplements prepared and filed on dates specified in the forms and instructions;

(E) Management's Discussion and Analysis, due on or before April 1, 2009;

(F) Statement of Actuarial Opinion, due on or before March 1, 2009;

(G) Supplemental Compensation Exhibit, due on or before March 1, 2009;

(H) Texas Overhead Assessment Exemption Form (Texas Edition), due on or before March 1, 2009. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed; and

(I) Analysis of Surplus (Texas Edition) for fraternal benefit societies, due on or before March 1, 2009.

(2) Foreign fraternal insurers filing only electronically with the NAIC and not filing a paper copy with the department shall file a signed jurat page with the department in lieu of filing the entire paper filing.

(3) Electronic filings by domestic and foreign insurers to be filed with the NAIC:

(A) 2008 Fraternal Annual Statement electronic filing and PDF filing, due on or before March 1, 2009;

(B) 2008 Fraternal Annual Statement of the Separate Accounts electronic filing and PDF filing, due on or before March 1, 2009;

(C) 2009 Fraternal Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2009; and

(D) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for the Supplemental Compensation Exhibit) due on the dates specified in the forms.

(4) Statement of Actuarial Opinion required by paragraph (1)(F) of this subsection shall be prepared in accordance with the following:

(A) Unless exempted, the Statement of Actuarial Opinion, attached to the 2008 Fraternal Annual Statement, should follow the applicable provisions of §§3.1601 - 3.1608 of this title.

(B) For those companies exempted from §§3.1601 - 3.1608 of this title, instructions 1 - 12, established by the NAIC, must be followed.

(C) Any company required by §3.4505(b)(3)(I) of this title to opine on the application of X factors, shall attach this opinion to the 2008 Fraternal Annual Statement, as applicable.

(5) The commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC.

(6) A foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 shall file an Analysis of Surplus (Texas Edition) for fraternal benefit societies with the department on or before March 1, 2009.

(g) Requirements for title insurers. Each title insurance company shall complete and file the following blanks and forms for the 2008 calendar year, and the first three quarters of the 2009 calendar year. The reports and forms identified in this subsection shall be completed in accordance with the "2008 Annual Statement Instructions, Title," and the "2009 Quarterly Statement Instructions, Title," as applicable. The electronic version of the filings with the NAIC identified in this subsection shall be in accordance with the NAIC data specifications and instructions and shall include PDF format filing. The filings for insurers described in this subsection are as follows:

(1) Domestic insurer reports and forms in paper copy to be filed only with the department as follows:

(A) 2008 Title Annual Statement, including printed investment schedule details, due on or before March 1, 2009;

(B) 2009 Title Quarterly Statements, due on or before May 15, August 15, and November 15, 2009;

(C) All the paper copies of the annual and quarterly supplements prepared and filed on dates described in the forms and instructions;

(D) Management's Discussion and Analysis, due on or before April 1, 2009;

(E) Statement of Actuarial Opinion, due on or before March 1, 2009;

(F) Supplemental Compensation Exhibit, due on or before March 1, 2009;

(G) Schedule SIS, due on or before March 1, 2009;

(H) Texas Overhead Assessment Exemption Form (Texas Edition), due on or before March 1, 2009. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed; and

(I) Analysis of Surplus (Texas Edition) for title companies, due on or before March 1, 2009.

(2) Foreign companies filing electronically with the NAIC and not filing a paper copy with the department shall file a signed jurat page with the department in lieu of filing the entire paper filing.

(3) Electronic filings with the NAIC by domestic and foreign insurers:

(A) 2008 Title Annual Statement electronic filings and PDF filings, due on or before March 1, 2009;

(B) 2008 Title Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2009;

(C) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for Schedule SIS and Supplemental Compensation Exhibit which are only filed by domestic insurers with the department in paper copy) due on the dates specified in the forms and instructions;

(D) Management Discussion and Analysis, due on or before April 1, 2009; and

(E) Statement of Actuarial Opinion, due on or before March 1, 2009.

(4) The commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC.

(5) A foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 shall file an Analysis of Surplus (Texas Edition) for title insurers on or before March 1, 2009.

(h) Requirements for health maintenance organizations. Each health maintenance organization licensed pursuant to the Insurance Code Chapter 843 shall complete the 2008 Health Annual Statement, and the 2009 Quarterly Statements. Insurers that are subject to life insurance statutes and are permitted or allowed to do the business of health maintenance organizations shall file the Texas HMO supplement forms as part of their annual and quarterly statement filings. The forms and reports required in this subsection shall be completed in accordance with the "2008 Annual Statement Instructions, Health," and the "2009 Quarterly Statement Instructions, Health," as applicable. The Texas supplemental forms required in this subsection and provided by the department shall be completed in accordance with the instructions on the forms. The Statement of Actuarial Opinion shall include the additional requirements of the department set forth in paragraph (1)(D) of this subsection. The electronic data filings with the NAIC shall be in accordance with NAIC data specifications and instructions and shall include PDF format filing. The Texas specific electronic filings regarding HMO data requested by the department shall be filed in accordance with the instructions provided by the department. The filings for insurers described in this subsection are as follows:

(1) Domestic and foreign insurer reports and forms in paper copy to be filed only with the department:

(A) 2008 Health Annual Statement, including printed investment schedule detail, due on or before March 1, 2009;

(B) 2009 Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2009. With each quarterly filing, include an up-to-date and completed Schedule E - Part 3 - Special Deposits, utilizing the format from the 2008 Health Annual Statement;

(C) Management's Discussion and Analysis, due on or before April 1, 2009; and

(D) Statement of Actuarial Opinion, due on or before March 1, 2009. In addition to the requirements set forth in the "2008 Annual Statement Instructions, Health," the department requires that the actuarial opinion include the following:

(i) The Statement of Actuarial Opinion must include assurance that an actuarial report and underlying actuarial work papers supporting the actuarial opinion will be maintained at the company and available for examination for seven years. The foregoing must be available by May 1 of the year following the year end for which the opinion was rendered or within two weeks after a request from the commissioner. The suggested wording used will depend on whether the actuary is employed by the company or is a consulting actuary. The wording for an actuary employed by the company should be similar to the following: "An actuarial report and any underlying actuarial work papers supporting the findings expressed in this Statement of Actuarial Opinion will be retained for a period of seven years in the administrative offices of the company and available for regulatory examination." The wording for a consulting actuary retained by the company should be similar to the following: "An actuarial report and any underlying actuarial work papers supporting the findings expressed in this Statement of Actuarial Opinion have been provided to the company to be retained for a period of seven years in the administrative offices of the company and available for regulatory examination."

(ii) Under the scope paragraph requirements of section 5 of the "2008 Annual Statement Instructions, Health," relating to the Actuarial Certification, the department requires that the actuarial opinion specifically list the premium deficiency reserve as an item and disclose the amount of such reserve.

(2) Domestic insurer reports and forms to be filed with the department:

(A) Supplemental Compensation Exhibit in paper copy only, due on or before March 1, 2009;

(B) Texas Overhead Assessment Exemption Form (Texas Edition) in paper copy only, due on or before March 1, 2009. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed;

(C) Texas HMO Supplement Annual (Texas Edition), in paper copy and electronic filing, containing annual data for calendar year 2008, to be completed according to the instructions provided by the department, due on or before March 1, 2009;

(D) Texas HMO Supplement Quarterly (Texas Edition), in paper copy and electronic filings, containing quarterly statement data for calendar-year 2009, to be completed according to the instructions

provided by the department, due on or before May 15, August 15, and November 15, 2009.

(3) Electronic filings with the NAIC by domestic and foreign insurers:

(A) 2008 Health Annual Statement electronic filing, and PDF filing, due on or before March 1, 2009;

(B) 2009 Health Quarterly Statement electronic filing and PDF filing, due on or before May 15, August 15, and November 15, 2009;

(C) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for Schedule SIS and Supplemental Compensation Exhibit which are only filed by domestic insurers with the department in paper copy) due on the dates specified in the forms and instructions;

(D) Statement of Actuarial Opinion, due on or before March 1, 2009; and

(E) Management Discussion and Analysis, due on or before April 1, 2009.

(i) Requirements for farm mutual insurers not subject to the provisions of subsection (e) of this section. Farm mutual insurance companies not subject to subsection (e) of this section shall file the following blanks and forms for the 2008 calendar year with the department only, on or before March 1, 2009:

(1) Annual Statement (Texas Edition);

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed; and

(3) Statement of Actuarial Opinion, unless exempted under §7.31 of this title (relating to Annual Statement Instructions for Farm Mutual Insurance Companies).

(j) Requirements for statewide mutual assessment associations, local mutual aid associations, mutual burial associations and exempt associations. Each statewide mutual assessment association, local mutual aid association, mutual burial association and exempt association shall complete and file the following blanks and forms for the 2008 calendar year with the department only, on or before April 1, 2009:

(1) Annual Statement (Texas Edition) (exempt companies are required to complete all pages except lines 22, 23, 24, 25, and 26 on page 3, the special instructions at the bottom of page 3, and pages 4 - 7);

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed;

(3) Release of Contributions Form (Texas Edition);

(4) 3-1/2 Percent Chamberlain Reserve Table (Reserve Valuation) (Texas Edition);

(5) Reserve Summary (1956 Chamberlain Table 3-1/2 Percent) (Texas Edition);

(6) Inventory of Insurance in Force by Age of Issue or Reserving Year (Texas Edition); and

(7) Summary of Inventory of Insurance in Force by Age and Calculation of Net Premiums (Texas Edition).

(k) Requirements for nonprofit legal service corporations. Each nonprofit legal service corporation doing business as authorized by a certificate of authority issued under the Insurance Code Chapter 961 shall complete and file the following blanks and forms for the 2008 calendar year with the department only. An actuarial opinion is not required. The following forms are to be filed on or before March 1, 2009:

(1) Annual Statement (Texas Edition); and

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed.

(l) Requirements for Mexican casualty insurance companies. Each Mexican casualty insurance company doing business as authorized by a certificate of authority issued under the Insurance Code Chapter 984, shall complete and file the following blanks and forms for the 2008 calendar year with the department only. All submissions shall be printed or typed in English and all monetary values shall be clearly designated in United States dollars. The form identified in paragraph (1) of this subsection shall be completed to the extent specified in paragraph (1) of this subsection and in accordance with the "2008 Annual Statement Instructions, Property and Casualty." An actuarial opinion is not required. It is the express intent of this subsection that it shall not repeal or otherwise modify or amend any department rule or the Insurance Code. The following blanks or forms are to be filed on or before March 1, 2009:

(1) 2008 Property and Casualty Annual Statement; provided, however, only pages 1 - 4, and 104 (Schedule T) are required to be completed;

(2) A copy of the balance sheet and the statement of profit and loss from the Mexican financial statement (printed or typed in English);

(3) A copy of the official documents issued by the Comision Nacional de Seguros y Fianzas approving the 2008 annual statement; and

(4) A copy of the current license to operate in the Republic of Mexico.

(m) Other financial reports. Nothing in this section prohibits the department from requiring any insurer or other regulated entity from filing other financial reports with the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900884
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: March 19, 2009
Proposal publication date: January 2, 2009
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 334. UNDERGROUND AND ABOVEGROUND STORAGE TANKS

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts amendments to §§334.71, 334.201, and 334.503 *without changes* to the proposed text as published in the November 21, 2008, issue of the *Texas Register* (33 TexReg 9433) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In a prior rulemaking proposal published May 2, 2008, and adopted on October 8, 2008, the commission sought input regarding the appropriateness of whether Leaking Petroleum Storage Tank (LPST) sites should be removed from the requirements of 30 TAC Chapter 350 to support statutory changes made to Texas Water Code (TWC), §26.351(a) and (i), by House Bill 3554, 80th Legislature, 2007, authored by Representative Carl Isett. The commission directed staff at the October 8, 2008 Agenda to initiate a rulemaking and address the LPST issue in a comprehensive rulemaking for both Chapter 334 and Chapter 350, Texas Risk Reduction Program.

SECTION BY SECTION DISCUSSION

Subchapter D - Release, Reporting, and Corrective Action

The commission adopts the amendment to §334.71(a) to remove language requiring the use of Chapter 350 for releases discovered and reported to the agency on or after September 1, 2003. Currently, LPST sites discovered and reported on or after September 1, 2003 are required to follow Chapter 334, with the exception that Chapter 350 be used in lieu of §§334.78 - 334.81. This rulemaking would effectively reinstate the use of §§334.78 - 334.81, and make corresponding rule changes to amend §350.2(g), by eliminating language requiring compliance with Chapter 350, for the assessment, response actions, and post-response action care for releases of regulated substances from underground storage tanks (USTs) or aboveground storage tanks (ASTs).

Subchapter G - Target Concentration Criteria

The commission adopts the amendment to §334.201(a) and (b), to remove the applicability of the Texas Risk Reduction Program (TRRP) to the criteria by which target concentrations are established for cleanup of LPST site releases. The commission also adopts a clarifying change to subsection (b) in order to remove an out-dated reference to agency guidance documents.

Subchapter K - Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil

The commission adopts the amendment to §334.503(b) and (c), to remove the applicability of the TRRP to reuse of petroleum-substance waste.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Concerning the economy, this rule package represents a return to a more streamlined and flexible process for owners or operators of USTs or ASTs (e.g. retail gasoline stations) to address contamination resulting from releases from tank systems. Because costs of gasoline and diesel are a major concern for the Texas economy and the general public, it is sufficient to note that a streamlined and flexible process may result in a benefit to the economy. Concerning jobs, competition, and productivity, nothing in this package can be estimated to adversely affect these areas; to the extent that a benefit to the economy described above could also benefit jobs, competition, and productivity, then we expect to see a benefit in these areas as well.

Concerning "the environment, or the public health and safety of the state," the commission would first point out that the Chapter 334 assessment and corrective action rules and guidance are currently being used at a majority (approximately 63%) of open LPST sites. (These were LPST releases discovered and reported before September 1, 2003.) This rule affects only LPST releases discovered and reported on or after September 1, 2003, including future LPST sites.

Second, the commission notes that the particular Chapter 334 rules and guidance of concern here were originally proposed and adopted in 1995. House Bill 2587, 74th Legislature, 1995, effective September 1, 1995, significantly revised regulatory authority and responsibilities relative to USTs and ASTs. The rules proposed in July 1995 and adopted October 1995, officially incorporated "risk-based corrective action." This is the same risk-based corrective action program which this rule package uses for all current and future LPST sites. As stated in the 1995 rule proposal, the commission recognizes the level of remediation warranted at a high risk site will not be equivalent to the level necessary at a low risk site and that appropriate target concentrations and target cleanup levels should be used in determining risk actually posed to the environment and health or human safety. When risk pathways are not present or less risk is posed at a site, corrective action may generally be conducted more expeditiously. Thus, "risk" is the primary consideration in Chapter 334, as required by the TWC. Certain questions are approached using risk analysis, such as how far does a groundwater contamination plume need to be delineated, or for how many years, or to what concentration levels does natural attenuation have to be monitored. Remediation itself may involve a number of different actions, from soil removal to removal of "free product" (also known as non-aqueous phase liquid or NAPL) from wells, to engineered groundwater systems, to monitored natural attenuation (since petroleum products naturally biodegrade to a large degree). In each of these actions, effectiveness and efficiency of removing actual risk pathways to human health and the environment must be considered, as required by the statute, regardless of whether Chapter 334 or Chapter 350 is being applied.

Thus, when actual risk is considered, the Chapter 334 rules, both in 1995 and in the current rule, are adequately protective of the environment. Although there may be discrete scenarios where Chapter 350 and Chapter 334 assessment and remediation require a different process and may have comparative positive or negative effects, taken as a whole this rule does not represent

a major environmental rule which adversely affects the environment or the public health and safety.

Lastly, even if this rule were considered a "major environmental rule," it fails the second test under the Texas Government Code. It does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). That section states: "(a) This section applies only to a major environmental rule adopted by a state agency, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law." None of these four elements is applicable; the rule package does not exceed any federal or state requirements, nor exceed delegation agreements or contracts. The rule package is adopted under a specific state law, TWC, §26.351, and it is not adopted solely under the general powers of the agency.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rule is subject to Texas Government Code, Chapter 2007. The rulemaking returns LPST assessment and remediation to the same rules that were in effect before September 1, 2003. This may result in lower costs for assessment of releases from tanks, and may result in closure status being granted more quickly.

Promulgation and enforcement of the amendments would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the rulemaking does not affect a landowner's rights in real property because the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the amendments.

Although a contaminated LPST site or contaminated neighboring property may suffer from market devaluation due to contamination, this devaluation is due to the basic fact of the presence of contamination; it cannot be concluded that the choice of application of Chapter 334 risk-based corrective action in lieu of TRRP would "cause" the devaluation. As a whole, this rulemaking is not anticipated to be a cause of a reduction in market value of private real property, does not create a burden on private real property, and will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found the rulemaking identified in the Coastal Coordination Act Implementation Rules (31 TAC §505.11(b)(2)) subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined the rulemaking protects the environment by ensuring that the CMP goals and policies will not be adversely affected by the rule changes described in this preamble for the reason that although Chapter 334 cleanup requirements will now be used without Chapter 350 cleanup requirements, Chapter 334 risk-based corrective action requirements are adequately protective of human health and the environment.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received concerning the CMP.

PUBLIC COMMENT

A public hearing on this rulemaking was held in Austin on December 16, 2008, 10:00 a. m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The comment period closed on January 5, 2009. The commission received comments from: ATC Associates, Inc. (ATC); Brookshire Brothers, Ltd. (Brookshire Brothers); Chambers Pump Service, Inc. (Chambers); Clear Fork Consulting Services (Clear Fork); GSI Environmental (GSI); Lowerre, Frederick, Perales, Allmon and Rockwell, Attorneys at Law on behalf of their own firm and on behalf of Clean Water Action, Texas Center for Policy Studies, Texas Conservation Alliance, Environment Texas, Public Citizen, Sierra Club (Lone Star Chapter), Sustainable Energy & Economic Development Coalition, Texas Campaign for the Environment, and Environmental Defense Fund (Lowerre); Texas Oil and Gas Association (TxOGA); Texas Petroleum Marketers and Convenience Store Association (TPCA); Valero Retail Holdings, Inc. (Valero); and an individual.

ATC, Brookshire Brothers, Chambers, Clear Fork, TxOGA, TPCA, and Valero were in favor of the proposed rule changes. Lowerre and one individual objected to any removal of LPST sites from TRRP, without suggesting alternate language. GSI was not clearly in favor or against, but did suggest delaying the effective date of implementation of this rule to ensure consistency with updated guidance documents.

RESPONSE TO COMMENTS

Comments Regarding General Protectiveness of Human Health, Safety, and the Environment

A number of commenters made general points concerning the protectiveness of the Chapter 334 and Chapter 350 rules for human health and the environment. Brookshire Brothers stated its agreement with the idea that Chapter 334 rules and guidance adequately protect the environment, while providing appropriate regulatory flexibility. Brookshire Brothers further pointed out that Chapter 334 was accepted by the United States Environmental Protection Agency (EPA) as being protective. Chambers commented that the Chapter 334 rules have served Texas very well for cleaning up the environment. TPCA stated that tens of thousands of LPST sites have been successfully closed under Chapter 334 and that subsequent analysis demonstrated that closure under Chapter 334 was just as protective of the environment as closure under Chapter 350. TPCA further stated that both chapters are structured to provide similar assessment of sites and that they both require: a) survey of ecological receptors; b) delineation of contaminant plume; c) removal of NAPL to the extent practicable; d) achievement of similar human health points of exposure; and e) notification of off-site property owners. TxOGA communicated its view that Chapter 334 standards and procedures are actually more environmentally protective than those in Chapter 350. ATC stated the Chapter 334 rules provided a simple and concise risk-based site assessment program that

protected human health and the environment, while it found the TRRP rules and guidance documents cumbersome for handling petroleum storage tank (PST) sites.

Lowerre asserted that the transfer of the LPST program to Chapter 334 would be less protective of public health and the environment and would represent a step backward from protections in TRRP. An individual who described himself as a senior environmental consultant stated that use of Chapter 334 would result in sites that get less cleaned up.

The commission responds that concerning the question of comparative protectiveness of Chapter 334 versus Chapter 350 assessment and remediation requirements, it would first point out that the Chapter 334 assessment and corrective action rules and guidance are currently being used at a majority (approximately 63%) of open LPST sites. These were LPST releases discovered and reported before September 1, 2003. This rulemaking affects only LPST releases discovered and reported on or after September 1, 2003, including future LPST sites.

The commission further responds to the general question of protectiveness by emphasizing that both Chapter 334 and Chapter 350 were designed to be protective of human health and the environment, in order to fulfill the agency's mission and in order to comply with both Texas and Federal law. Both chapters were written to be protective within the frame work of risk-based corrective action. According to TWC, §26.342(15), "risk-based corrective action" means site assessment or site remediation, the timing, type, and degree of which is determined according to case-by-case consideration of actual or potential risk to public health from environmental exposure to a regulated substance released from a leaking underground or aboveground storage tank. The commission agrees with commenters who note that both chapters are structured to be protective by providing parallel areas of assessment and action, such as: 1) plumes must be delineated; 2) pathways of risk to receptors must be evaluated; 3) human health-based target concentrations are set using science-based formulas and numbers; 4) member of the public affected by an LPST must be notified; 5) groundwater plumes may be managed, taking into consideration the natural attenuation and biodegradation of petroleum substances. Although there are differences in process, terminology, and in certain numbers and formulae, the fundamental structure and goal of the two chapters are designed to be protective within the framework of "case-by-case" consideration of actual or potential risk to public health. As explained in the March 26, 1999 preamble of a prior rulemaking (see 24 TexReg 2210), the agency shifted from Chapter 334 to Chapter 350 for LPST sites reported after September 1, 2003, not in an effort to change substantive requirements relating to protectiveness, but to consolidate the regulatory strategies and requirements for the benefit of the regulated community and the agency. Since that time, however, response from the regulated community has been that Chapter 350 is ill-suited to LPST sites and that it has created additional burdens and costs which have not achieved a corresponding environmental benefit in terms of protectiveness. The commission has made no change to the rule in response to the comments received during this rulemaking.

Comments Regarding Off-Site Plume Delineation and Notification to Off-Site Landowners

Several commenters addressed the related issues of off-site plume delineation and notification to off-site landowners. TxOGA, TPCA, and Valero commented that delineation requirements under Chapter 334 are appropriate and effective because they consider actual and potential risk, and that delineation simply for the sake of delineation does not assist in meeting actual cleanup goals. TPCA further commented that under TRRP, a responsible party is still required to install monitoring wells on the property of adjacent landowners when it has already been shown the contamination has not left the LPST site.

Lowerre commented that Chapter 334 no longer requires full delineation of plumes because of a 1997 interoffice memorandum entitled "Guidance for Judging the Adequacy of Contaminant Delineation for Purposes of Determining if Further Corrective Action is Needed." Lowerre concedes that under TRRP, cleanup and closure at smaller sites in close vicinity to other properties may experience difficulties when neighboring property owners do not cooperate. However, Lowerre commented that this issue does not justify a shift back to Chapter 334. Additionally, Lowerre stated that 40 CFR §280.65 "Investigations for soil and ground-water cleanup" requires full characterization of soil and groundwater contamination in a number of instances.

The commission responds that although delineation of a plume is a basic component of assessing and addressing contamination, it is one aspect of an overall approach which must take into account actual and potential risk while taking actions to actually remediate. Delineation refers to discovering information about the location and nature of groundwater contamination through drilling and sampling of monitoring wells. Under Chapter 334, responsible parties work with TCEQ project managers in determining the most useful locations of monitoring wells.

The commission further responds that Chapter 334 meets the standard set by 40 CFR §280.65 "Investigations for soil and ground-water cleanup" because §334.80 mirrors this section almost verbatim and points out that on the question of notification, Chapter 334 provides for public participation in §334.82: "For each confirmed release that requires corrective action, the owner or operator must provide notice to the public by means designated to reach those members of the public directly affected by the release and the planned corrective action." The commission has made no changes to the rule in response to these comments.

Comment Regarding Analytical Requirements

Lowerre commented that analytical data requirements are less strict under Chapter 334 than under Chapter 350.

The commission agrees that Chapter 334 does not specify in rule the analytical requirements. However, the commission points out that under Chapter 334, the analytical data must be of known and documented quality to meet the program and project objectives just as in Chapter 350, and that the requirements are clearly specified in guidance. No change to the rule was made in response to this comment.

Comments regarding the Length of Time for the Entire LPST Process

A number of commenters stated that TRRP causes each stage of the LPST process (assessment, remediation, and closure) to take a longer amount of time. Valero expressed concerns with post-response action care, which TRRP states has a default period of up to 30 years. TxOGA noted that the industry is seeing a significant decline in TRRP sites closing and that the TCEQ will see an alarming reduction of site closures due to the very nature of TRRP. TPCA stated that its membership's experience with TRRP cleanups is that they require more time to assess, monitor, and eventually close.

TxOGA stated that TRRP is more suited to assessing large plumes due to chemical properties of chlorinated solvents and other chemicals not present in LPST releases. While TRRP is well suited for large tracts sites where cleanup can take decades, PST sites are typically small tracts located adjacent to other PST sites and light commercial businesses. ATC stated that its experience has been that the TRRP is better suited for large scale projects and/or solvent plumes, not retail gasoline station LPST sites. As a result, the commenters point out that the TRRP process is taking longer to achieve the required assessment, and site closure is difficult to achieve even though concentrations do not present a risk to human health or the environment.

The commission responds that time periods associated with the life cycle of an open LPST case are indeed an important concern. The commission determined that Chapter 334 provides flexibility to allow sites to be closed both effectively and expeditiously. The commission has made no change to the rule in response to these comments.

Comments regarding Institutional Controls

Brookshire Brothers stated that institutional controls (ICs) required by TRRP at commercial/industrial sites are particularly restrictive. The Chapter 334 allowance to implement ICs voluntarily as part of the remedial plan when non-standard exposure assumptions are used is more appropriate. Valero commented that Chapter 334 evaluates LPST sites and neighboring properties based upon current and/or future usage as residential or commercial/industrial and allows for ICs on an as-needed basis; however, TRRP requires ICs which unnecessarily burden a site and adjacent properties when there is no real risk to human health and the environment. TPCA commented that although TRRP does permit responsible parties to select an appropriate cleanup level based upon the property's use, TRRP requires that an LPST site (as well as other properties impacted by the release) be deed recorded if a risk-based closure is selected; this requirement delays remediation, increases costs, and encourages litigation as property owners adjacent to the LPST site object to deed recordation and insist upon remediation to TRRP's residential standards.

The commission responds that it is a legitimate concern that IC rules be appropriately tailored to actual or potential risk. Chapter 334, Subchapter G contains criteria for when and how ICs may be used. It is important to note that in Chapter 334, ICs are not merely "optional." They are required whenever a tank owner or operator wishes to use non-standard exposure assumptions when calculating risk. No changes were made in response to this comment.

Comments regarding the Cost of LPST Assessment and Remediation

Brookshire Brothers commented that returning LPST sites to Chapter 334 will result in a cost savings of 25% or more over the life of a typical LPST site, and that Chapter 334 is purposely designed for LPST sites which results in its strategies being more efficient than the strategies of Chapter 350. Chambers commented that costs have escalated as a result of Chapter 350 and that has been particularly harsh on small business owners, especially after the expiration of eligibility for reimbursement from the PST Remediation account. TxOGA, TPCA, and Valero also noted additional costs associated with Chapter 350, which they felt did not result in actual environmental benefit. TPCA, in addition, asserted that costlier cleanups will mean higher insurance premiums for tank owners or operators. ATC stated that it found the TRRP rules and guidance documents cumbersome for handling PST sites and that they required costly unnecessary site assessment.

An individual commented that the rule change is solely being made for the financial benefit of the gas station owners and not to create a cleaner environment, which should be the purpose of all environmental rulemaking.

The commission responds that both Chapter 334 and Chapter 350 are fundamentally protective of the environment. With that in mind, as part of our mission, it is both necessary and prudent to reassess regulatory requirements in terms of cost-benefit analysis. The commission has made no changes to the rule in response to these comments.

Comments Regarding Whether TRRP is Risk-Based

Clear Fork stated that Chapter 334 is a risk-based program and was recognized as such by EPA. Clear Fork also pointed out that TRRP does not utilize a case-by-case consideration of actual or reasonable exposure, and that all sites, including sites with no nearby wells and no beneficial use, are subject to the maximum concentration level requirement and delineation of soils to residential assessment levels.

TxOGA noted that cleanup standards under TRRP are not risk-based in practice because the difficulty of convincing neighboring landowners to sign deed restrictions means that the only option is to clean up to residential standards even if the neighboring property is commercial/industrial. TxOGA further commented that under TRRP, closure is not risk-based. Remedy Standard B is intended to be "risk-based" but in practice is not, for the reason that once a person gets a TRRP site to what would otherwise be a closure under Chapter 334, he is burdened with a requirement to monitor the site under Post Response Action Care.

Valero commented that Chapter 334 uses a risk-based approach and includes an evaluation of receptors, surface cover, groundwater use or likely future use, and geologic conditions. Valero further commented that TRRP requires delineation in all directions to basically non-detectable levels with virtually no regard to risk. TPCA also pointed out that delineation requirements are not risk-based under TRRP in many circumstances.

Lowerre commented that the TRRP rules provide a clearer process for identifying and addressing ecological risks.

The commission responds that risk-based corrective action was originally proposed in July 1995 and adopted into Chapter 334 of TCEQ rules in October 1995. As stated in the 1995 rule proposal, the commission recognizes the level of remediation warranted at a high risk site will not be equivalent to the level necessary at a low risk site and that appropriate target concentrations and target cleanup levels should be used in determining risk actually posed to the environment and health or human safety. When risk pathways are not present or less risk is posed at a site, corrective action may generally be conducted more expeditiously. Thus, "risk" is the primary consideration in Chapter 334, as required by the TWC. Certain questions are approached using risk analysis, such as how far does a groundwater contamination plume need to be delineated, or for how many years, or to what concentration levels does natural attenuation have to be monitored. Remediation itself may involve a number of different actions, from soil removal to removal of "free product" (also known as non-aqueous phase liquid or NAPL) from wells, to engineered groundwater systems, to monitored natural atten-

uation (since petroleum products naturally biodegrade to a large degree). In each of these actions, effectiveness and efficiency of removing actual risk pathways to human health and the environment must be considered, as required by the statute, regardless of whether Chapter 334 or Chapter 350 is being applied.

Thus, when actual risk is considered, the Chapter 334 rules, both in 1995 and in the current rule, are adequately protective of the environment. Although there may be discrete scenarios where Chapter 350 and Chapter 334 assessment and remediation require a different process and may have comparative positive or negative effects, taken as a whole this rule does not represent a major environmental rule which adversely affects the environment or the public health and safety.

The commission has made no changes to the rule in response to these comments.

Comments Regarding the Need to Revise Chapter 334 Guidance Documents

GSI commented that transferring LPST sites from Chapter 350, which is supported by up-to-date guidance documents for risk-based corrective action, to Chapter 334, which does not have the support of up-to-date guidance documents for risk-based corrective action, will result in inconsistent assessment and cleanup standards for the PST program. GSI also expressed concern about ease of use of the interoffice memoranda that were issued since 1994 to add to or modify regulatory guidance documents RG-36 "Risk-Based Corrective Action for Leaking Storage Tank Sites" (January 1994) and RG-411 "Investigating and Reporting Releases from the Petroleum Storage Tanks" (December 1994).

The commission acknowledges the concern for effective guidance documents; however, it also points out that roughly two-thirds of the sites currently in the PST Program were discovered and reported before September 1, 2003 and are therefore still effectively using Chapter 334 and its associated guidance documents and interoffice memoranda. Minor revisions to Chapter 334 guidance and interoffice memoranda are expected in the normal course of updating such types of documentation. Returning all sites to Chapter 334 assessment and cleanup requirements (rather than part in TRRP and part not) will actually achieve more consistency within the PST Program. No changes were made to the rule in response to this comment.

Comments Regarding the Intent of House Bill 3554

Several commenters addressed the legislative amendments to the Texas Water Code contained in House Bill 3554, 80th Legislature, 2007. TPCA stated that the House Bill 3554's requirement that the commission use "risk-based corrective action" was introduced and adopted in response to the TCEQ's rule change a few years prior, requiring that sites discovered and reported after September 1, 2003, must use TRRP instead of the "risk-based corrective action" developed in Chapter 334. TPCA noted both the language of the bill and the statement of intent by the bill's author.

An individual and Lowerre expressed the position that House Bill 3554 did not require the TCEQ to amend its rules to remove LPST sites from the TRRP. Lowerre commented that even if the sponsor of the bill stated his intent orally in committee or on the floor, the legislative intent is not established unless explicitly stated in the language of the bill.

The commission responds that House Bill 3554 specifically directed the agency to use "risk-based corrective action." That term was defined in TWC, Chapter 26 before the TCEQ adopted the TRRP as a rule. Thus, the plain language of the bill refers to a phrase which has a specific definition in both the TWC and Chapter 334. Both during the legislative session and afterwards, the bill author communicated to members of the legislature and the TCEQ that the intent of the bill was to return the PST Program to the rules that had been used to clean up thousands of LPST sites. The particular Chapter 334 rules and guidance of concern here were originally proposed and adopted in 1995. House Bill 2587, 74th Legislature, 1995, effective September 1, 1995, significantly revised regulatory authority and responsibilities relative to USTs and ASTs. The rules proposed in July 1995 and adopted October 1995, officially incorporated "risk-based corrective action." This is the same risk-based corrective action program which this rule package uses for all current and future LPST sites. The commission has made no change to the rule in response to these comments.

Comments Regarding Regulatory Oversight Concerns

TxOGA stated that TRRP does not provide the TCEQ with timely information key to making risk-based decisions. If a responsible party chooses not to submit an Affected Property Assessment Report right away, TRRP allows him to submit a Self-Implementation Notice giving him no reporting requirements for three years. In contrast, Chapter 334 requires timely assessments and updates as plumes are delineated.

The commission responds that although the agency shares a general concern with ensuring that remediation projects are progressing around the state, the commission also values the private sector's ability to voluntarily comply with regulations. The agency takes note of TxOGA's point, and further notes that the requirements for reporting and oversight are reasonable in both Chapter 334 and Chapter 350. No changes to the rule was made in response to this comment.

SUBCHAPTER D. RELEASE REPORTING AND CORRECTIVE ACTION

30 TAC §334.71

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST) and TWC, §26.011, which requires the commission to control the quality of water by rule.

The adopted amendment implements TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or AST.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900886
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: March 19, 2009
Proposal publication date: November 21, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER G. TARGET CONCENTRATION CRITERIA

30 TAC §334.201

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST) and TWC, §26.011, which requires the commission to control the quality of water by rule.

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SUBCHAPTER K. STORAGE, TREATMENT, AND REUSE PROCEDURES FOR PETROLEUM-SUBSTANCE CONTAMINATED SOIL

30 TAC §334.503

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST) and TWC, §26.011, which requires the commission to control the quality of water by rule.

The adopted amendment implements TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or AST.

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CHAPTER 350. TEXAS RISK REDUCTION PROGRAM

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts amendments to §§350.2, 350.4, 350.77, 350.91, and 350.92 *without changes* to the proposed text as published in the November 21, 2008, issue of the *Texas Register* (33 TexReg 9439) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In a prior rulemaking proposal published May 2, 2008, and adopted on October 8, 2008, the commission sought input regarding the appropriateness of whether Leaking Petroleum Storage Tank (LPST) sites should be removed from the requirements of Chapter 350 to support statutory changes made to Texas Water Code (TWC), §26.351(a) and (i) by House Bill 3554, 80th Legislature, 2007, authored by Representative Carl Isett. The commission directed staff at the October 8, 2008

Agenda to initiate a rulemaking and address the LPST issue in a comprehensive rulemaking for both 30 TAC Chapter 334, Underground and Aboveground Storage Tanks and Chapter 350.

SECTION BY SECTION DISCUSSION

Subchapter A - General Information

The commission adopts the amendment to §350.2 to eliminate language requiring compliance with Chapter 350 for the assessment, response actions, and post-response action care for releases of regulated substances from underground storage tanks (USTs) and aboveground storage tanks (ASTs). Currently, LPST sites discovered and reported on or after September 1, 2003 are required to follow Chapter 334, with the exception that Chapter 350 be used in lieu of certain parts of Chapter 334. This rulemaking would effectively reinstate the sole use of Chapter 334 for releases from USTs and ASTs.

The commission adopts the amendment to §350.4(a)(11) so that the definition of "chemical of concern" in the Texas Risk Reduction Program (TRRP) does not include reference to the UST provisions of the TWC and Chapter 334.

Subchapter D - Development of Protective Concentration Levels

The commission adopts the amendment to §350.77(b) so that the definition of "chemical of concern" does not include references to the UST provisions of the TWC and Chapter 334.

Subchapter E - Reports

The commission adopts the amendments to §350.91 and §350.92 to remove reference to LPST identification numbers.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Concerning the economy, this rule package represents a return to a more streamlined and flexible process for owners or operators of USTs or ASTs (e.g. retail gasoline stations) to address contamination resulting from releases from tank systems. Because costs of gasoline and diesel are a major concern for the Texas economy and the general public, it is sufficient to note that a streamlined and flexible process may result in a benefit to the economy. Concerning jobs, competition, and productivity, nothing in this package can be estimated to adversely affect these areas; to the extent that a benefit to the economy previously described could also benefit jobs, competition, and productivity, then we expect to see a benefit in these areas as well.

Concerning "the environment, or the public health and safety of the state," the commission would first point out that the Chapter 334 assessment and corrective action rules and guidance are currently being used at a majority (approximately 63%) of open LPST sites. (These were LPST releases discovered and reported before September 1, 2003.) This rule affects only LPST releases discovered and reported on or after September 1, 2003, including future LPST sites.

Second, the commission notes that the particular Chapter 334 rules and guidance of concern here were originally proposed and adopted in 1995. House Bill 2587, 74th Legislature, 1995, effective September 1, 1995, significantly revised regulatory authority and responsibilities relative to USTs and ASTs. The rules proposed in July 1995 and adopted October 1995, officially incorporated "risk-based corrective action." This is the same risk-based corrective action program which this rule package uses for all current and future LPST sites. As stated in the 1995 rule proposal, the commission recognizes that the level of remediation warranted at a high risk site will not be equivalent to the level necessary at a low risk site and that appropriate target concentrations and target cleanup levels should be used in determining risk actually posed to the environment and health or human safety. When risk pathways are not present or less risk is posed at a site, corrective action may generally be conducted more expeditiously. Thus, "risk" is the primary consideration in Chapter 334, as required by the TWC. Certain questions are approached using risk analysis, such as how far does a groundwater contamination plume need to be delineated, or for how many years, or to what concentration levels does natural attenuation have to be monitored. Remediation itself may involve a number of different actions, from soil removal to removal of "free product" (also known as non-aqueous phase liquid or NAPL) from wells, to engineered groundwater systems, to monitored natural attenuation (since petroleum products naturally biodegrade to a large degree). In each of these actions, effectiveness and efficiency of removing actual risk pathways to human health and the environment must be considered, as required by the statute, regardless of whether Chapter 334 or Chapter 350 is being applied.

Thus, when actual risk is considered, the Chapter 334 rules, both in 1995 and in the current rulemaking, are adequately protective of the environment. Although there may be discrete scenarios where Chapter 350 and Chapter 334 assessment and remediation require a different process and may have comparative positive or negative effects, taken as a whole this rule does not represent a major environmental rule which adversely affects the environment or the public health and safety.

Lastly, even if this rule were considered a "major environmental rule," it fails the second test under the Texas Government Code. It does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). That section states: "(a) This section applies only to a major environmental rule adopted by a state agency, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law." None of these four elements is applicable; the rule package does not exceed any federal or state requirements, nor exceed delegation agreements or contracts. The rule package is adopted under a specific state law, TWC, §26.351, and it is not adopted solely under the general powers of the agency.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rule is subject to Texas Government Code, Chapter 2007. The rulemaking returns LPST assessment and remediation to the same rules that were in effect before September 1, 2003. This may result in lower costs for assessment of releases from tanks, and may result in closure status being granted more quickly.

Promulgation and enforcement of the amendments would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the rulemaking does not affect a landowner's rights in real property because the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the amendments.

Although a contaminated LPST site or contaminated neighboring property may suffer from market devaluation due to contamination, this devaluation is due to the basic fact of the presence of contamination; it cannot be concluded that the choice of application of Chapter 334 risk-based corrective action in lieu of TRRP would "cause" the devaluation. As a whole, this rulemaking is not anticipated to be a cause of a reduction in market value of private real property, does not create a burden on private real property, and will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in the Coastal Coordination Act Implementation Rules (31 TAC §505.11(b)(2)) subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined the rulemaking protects the environment by ensuring that the CMP goals and policies will not be adversely affected by the rule changes described in this preamble for the reason that although Chapter 334 cleanup requirements will now be used without Chapter 350 cleanup requirements, Chapter 334 risk-based corrective action requirements are adequately protective of human health and the environment.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

PUBLIC COMMENT

A public hearing on this rulemaking was held in Austin on December 16, 2008, 10:00 a. m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The comment period closed on January 5, 2009. The commission received comments from: ATC Associates Inc. (ATC); Brookshire Brothers, Ltd. (Brookshire Brothers); Chambers Pump Service, Inc. (Chambers); Clear Fork Consulting Services (Clear Fork); GSI Environmental (GSI); Lowerre, Frederick, Perales, Allmon and Rockwell, Attorneys at Law on behalf of their own firm and on behalf of Clean Water Action, Texas Center for Policy Studies, Texas Conservation Alliance, Environment Texas, Public Citizen, Sierra Club (Lone Star Chapter), Sustainable Energy and Economic Development Coalition, Texas Campaign for the Environment, Environmental Defense Fund (Lowerre); Texas Oil and Gas Association (TxOGA); Texas Petroleum Marketers and Convenience Store Association (TPCA); Valero Retail Holdings, Inc. (Valero); and an individual.

ATC, Brookshire Brothers, Chambers, Clear Fork, TxOGA, TPCA, and Valero were in favor of the proposed rule changes. Lowerre and one individual objected to any removal of LPST sites from TRRP, without suggesting alternate language. GSI was not clearly in favor or against, but did suggest delaying the effective date of implementation of this rule to ensure consistency with updated guidance documents.

RESPONSE TO COMMENTS

Comments Regarding General Protectiveness of Human Health, Safety, and the Environment

A number of commenters made general points concerning the protectiveness of the Chapter 334 and Chapter 350 rules for human health and the environment. Brookshire Brothers stated its agreement with the idea that Chapter 334 rules and guidance adequately protect the environment while providing appropriate regulatory flexibility. Brookshire Brothers further pointed out Chapter 334 was accepted by the United States Environmental Protection Agency (EPA) as being protective. Chambers commented that the Chapter 334 rules have served Texas very well for cleaning up the environment. TPCA stated that tens of thousands of LPST sites have been successfully closed under Chapter 334 and that subsequent analysis demonstrated that closure under Chapter 334 was just as protective of the environment as closure under Chapter 350. TPCA further stated that both chapters are structured to provide similar assessment of sites and that they both require: a) survey of ecological receptors; b) delineation of contaminant plume; c) removal of NAPL to the extent practicable; d) achievement of similar human health points of exposure; and e) notification of off-site property owners. TxOGA communicated its view that Chapter 334 standards and procedures are actually more environmentally protective than those in Chapter 350. ATC stated the Chapter 334 rules provided a simple and concise risk-based site assessment program that protected human health and the environment, while it found the TRRP rules and guidance documents cumbersome for handling petroleum storage tank (PST) sites.

Lowerre asserted that the transfer of the LPST program to Chapter 334 would be less protective of public health and the environment and would represent a step backward from protections in TRRP. An individual who described himself as a senior environmental consultant stated that use of Chapter 334 would result in sites that get less cleaned up.

The commission responds that concerning the question of comparative protectiveness of Chapter 334 versus Chapter 350 assessment and remediation requirements, it would first point out that the Chapter 334 assessment and corrective action rules and guidance are currently being used at a majority (approximately 63%) of open LPST sites. These were LPST releases discovered and reported before September 1, 2003. This rulemaking affects only LPST releases discovered and reported on or after September 1, 2003, including future LPST sites.

The commission further responds to the general question of protectiveness by emphasizing that both Chapter 334 and Chapter 350 were designed to be protective of human health and the environment, in order to fulfill the agency's mission and in order to comply with both Texas and Federal law. Both chapters were written to be protective within the frame work of risk-based cor-

rective action. According to TWC, §26.342(15), "risk-based corrective action" means site assessment or site remediation, the timing, type, and degree of which is determined according to case-by-case consideration of actual or potential risk to public health from environmental exposure to a regulated substance released from a leaking underground or aboveground storage tank. The commission agrees with commenters who note that both chapters are structured to be protective by providing parallel areas of assessment and action, such as: 1) plumes must be delineated; 2) pathways of risk to receptors must be evaluated; 3) human health-based target concentrations are set using science-based formulas and numbers; 4) member of the public affected by an LPST must be notified; 5) groundwater plumes may be managed, taking into consideration the natural attenuation and biodegradation of petroleum substances. Although there are differences in process, terminology, and in certain numbers and formulae, the fundamental structure and goal of the two chapters are designed to be protective within the framework of "case-by-case" consideration of actual or potential risk to public health. As explained in the March 26, 1999 preamble of a prior rulemaking (see 24 TexReg 2210), the agency shifted from Chapter 334 to Chapter 350 for LPST sites reported after September 1, 2003, not in an effort to change substantive requirements relating to protectiveness, but to consolidate the regulatory strategies and requirements for the benefit of the regulated community and the agency. Since that time, however, response from the regulated community has been that Chapter 350 is ill-suited to LPST sites and that it has created additional burdens and costs which have not achieved a corresponding environmental benefit in terms of protectiveness. The commission has made no change to the rule in response to the comments received during this rulemaking.

Comments Regarding Off-Site Plume Delineation and Notification to Off-Site Landowners

Several commenters addressed the related issues of off-site plume delineation and notification to off-site landowners. TxOGA, TPCA, and Valero commented that delineation requirements under Chapter 334 are appropriate and effective because they consider actual and potential risk, and that delineation simply for the sake of delineation does not assist in meeting actual cleanup goals. TPCA further commented that under TRRP, a responsible party is still required to install monitoring wells on the property of adjacent landowners when it has already been shown the contamination has not left the LPST site.

Lowerre commented that Chapter 334 no longer requires full delineation of plumes because of a 1997 interoffice memorandum entitled "Guidance for Judging the Adequacy of Contaminant Delineation for Purposes of Determining if Further Corrective Action is Needed." Lowerre concedes that under TRRP, cleanup and closure at smaller sites in close vicinity to other properties may experience difficulties when neighboring property owners do not cooperate. However, Lowerre commented that this issue does not justify a shift back to Chapter 334. Additionally, Lowerre stated that 40 CFR §280.65 "Investigations for soil and ground-water cleanup" requires full characterization of soil and groundwater contamination in a number of instances.

The commission responds that although delineation of a plume is a basic component of assessing and addressing contamination, it is one aspect of an overall approach which must take into account actual and potential risk while taking actions to actually remediate. Delineation refers to discovering information about the location and nature of groundwater contamination through drilling and sampling of monitoring wells. Under Chapter 334, responsible parties work with TCEQ project managers in determining the most useful locations of monitoring wells.

The commission further responds that Chapter 334 meets the standard set by 40 CFR §280.65 "Investigations for soil and ground-water cleanup" because §334.80 mirrors this section almost verbatim and points out that on the question of notification, Chapter 334 provides for public participation in §334.82: "For each confirmed release that requires corrective action, the owner or operator must provide notice to the public by means designated to reach those members of the public directly affected by the release and the planned corrective action." The commission has made no changes to the proposed rule in response to these comments.

Comment Regarding Analytical Requirements

Lowerre commented that analytical data requirements are less strict under Chapter 334 than under Chapter 350.

The commission agrees that Chapter 334 does not specify in rule the analytical requirements. However, the commission points out that under Chapter 334, the analytical data must be of known and documented quality to meet the program and project objectives just as in Chapter 350, and that the requirements are clearly specified in guidance. No change to the rule was made in response to this comment.

Comments regarding the Length of Time for the Entire LPST Process

A number of commenters stated that TRRP causes each stage of the LPST process (assessment, remediation, and closure) to take a longer amount of time. Valero expressed concerns with post-response action care, which TRRP states has a default period of up to 30 years. TxOGA noted that the industry is seeing a significant decline in TRRP sites closing and that the TCEQ will see an alarming reduction of site closures due to the very nature of TRRP. TPCA stated that its membership's experience with TRRP cleanups is that they require more time to assess, monitor, and eventually close.

TxOGA stated that TRRP is more suited to assessing large plumes due to chemical properties of chlorinated solvents and other chemicals not present in LPST releases. While TRRP is well suited for large tracts sites where cleanup can take decades, PST sites are typically small tracts located adjacent to other PST sites and light commercial businesses. ATC stated that its experience has been that the TRRP is better suited for large scale projects and/or solvent plumes, not retail gasoline station LPST sites. As a result, the commenters point out that the TRRP process is taking longer to achieve the required assessment, and site closure is difficult to achieve even though concentrations do not present a risk to human health or the environment.

The commission responds that time periods associated with the life cycle of an open LPST case are indeed an important concern. The commission determined that Chapter 334 provides flexibility to allow sites to be closed both effectively and expeditiously. The commission has made no change to the rule in response to these comments.

Comments regarding Institutional Controls

Brookshire Brothers stated that institutional controls (ICs) required by TRRP at commercial/industrial sites are particularly restrictive. The Chapter 334 allowance to implement ICs volun-

tarily as part of the remedial plan when non-standard exposure assumptions are used is more appropriate. Valero commented that Chapter 334 evaluates LPST sites and neighboring properties based upon current and/or future usage as residential or commercial/industrial and allows for ICs on an as-needed basis; however, TRRP requires ICs which unnecessarily burden a site and adjacent properties, when there is no real risk to human health and the environment. TPCA commented that although TRRP does permit responsible parties to select an appropriate cleanup level based upon the property's use, TRRP requires that an LPST site (as well as other properties impacted by the release) be deed recorded if a risk-based closure is selected; this requirement delays remediation, increases costs, and encourages litigation as property owners adjacent to the LPST site object to deed recordation and insist upon remediation to TRRP's residential standards.

The commission responds that it is a legitimate concern that IC rules be appropriately tailored to actual or potential risk. Chapter 334, Subchapter G, contains criteria for when and how ICs may be used. It is important to note that in Chapter 334, ICs are not merely "optional." They are required whenever a tank owner or operator wishes to use non-standard exposure assumptions when calculating risk. No changes were made in response to this comment.

Comments regarding the Cost of LPST Assessment and Remediation

Brookshire Brothers commented that returning LPST sites to Chapter 334 will result in a cost savings of 25% or more over the life of a typical LPST site, and that Chapter 334 is purposely designed for LPST sites which results in its strategies being more efficient than the strategies of Chapter 350. Chambers commented that costs have escalated as a result of Chapter 350 and that has been particularly harsh on small business owners, especially after the expiration of eligibility for reimbursement from the PST Remediation account. TxOGA, TPCA, and Valero also noted additional costs associated with Chapter 350, which they felt did not result in actual environmental benefit. TPCA, in addition, asserted that costlier cleanups will mean higher insurance premiums for tank owners or operators. ATC stated that it found the TRRP rules and guidance documents cumbersome for handling PST sites and that they required costly unnecessary site assessment.

An individual commented that the rule change is solely being made for the financial benefit of the gas station owners and not to create a cleaner environment, which should be the purpose of all environmental rulemaking.

The commission responds that both Chapter 334 and Chapter 350 are fundamentally protective of the environment. With that in mind, as part of our mission, it is both necessary and prudent to reassess regulatory requirements in terms of cost-benefit analysis. The commission has made no changes to the rule in response to these comments.

Comments Regarding Whether TRRP is Risk-Based

Clear Fork stated that Chapter 334 is a risk-based program and was recognized as such by EPA. Clear Fork also pointed out that TRRP does not utilize a case-by-case consideration of actual or reasonable exposure, and that all sites, including sites with no nearby wells and no beneficial use, are subject to the maximum concentration level requirement and delineation of soils to residential assessment levels.

TxOGA noted that cleanup standards under TRRP are not risk-based in practice because the difficulty of convincing neighboring landowners to sign deed restrictions means that the only option is to clean up to residential standards even if the neighboring property is commercial/industrial. TxOGA further commented that under TRRP, closure is not risk-based. Remedy Standard B is intended to be "risk-based" but in practice is not, for the reason that once a person gets a TRRP site to what would otherwise be a closure under Chapter 334, he is burdened with a requirement to monitor the site under Post Response Action Care.

Valero commented that Chapter 334 uses a risk-based approach and includes an evaluation of receptors, surface cover, groundwater use or likely future use, and geologic conditions. Valero further commented that TRRP requires delineation in all directions to basically non-detectable levels with virtually no regard to risk. TPCA also pointed out that delineation requirements are not risk-based under TRRP in many circumstances.

Lowerre commented that the TRRP rules provide a clearer process for identifying and addressing ecological risks.

The commission responds that risk-based corrective action was originally proposed in July 1995 and adopted into Chapter 334 of TCEQ rules in October 1995. As stated in the 1995 rule proposal, the commission recognizes the level of remediation warranted at a high risk site will not be equivalent to the level necessary at a low risk site and that appropriate target concentrations and target cleanup levels should be used in determining risk actually posed to the environment and health or human safety. When risk pathways are not present or less risk is posed at a site, corrective action may generally be conducted more expeditiously. Thus, "risk" is the primary consideration in Chapter 334, as required by the TWC. Certain questions are approached using risk analysis, such as how far does a groundwater contamination plume need to be delineated, or for how many years, or to what concentration levels does natural attenuation have to be monitored. Remediation itself may involve a number of different actions, from soil removal to removal of "free product" (also known as non-aqueous phase liquid or NAPL) from wells, to engineered groundwater systems, to monitored natural attenuation (since petroleum products naturally biodegrade to a large degree). In each of these actions, effectiveness and efficiency of removing actual risk pathways to human health and the environment must be considered, as required by the statute, regardless of whether Chapter 334 or Chapter 350 is being applied.

Thus, when actual risk is considered, the Chapter 334 rules, both in 1995 and in the current rule, are adequately protective of the environment. Although there may be discrete scenarios where Chapter 350 and Chapter 334 assessment and remediation require a different process and may have comparative positive or negative effects, taken as a whole this rule does not represent a major environmental rule which adversely affects the environment or the public health and safety.

The commission has made no changes to the rule in response to these comments.

Comments Regarding the Need to Revise Chapter 334 Guidance Documents

GSI commented that transferring LPST sites from Chapter 350, which is supported by up-to-date guidance documents for risk-based corrective action, to Chapter 334, which does not have the support of up-to-date guidance documents for risk-based corrective action, will result in inconsistent assessment and cleanup standards for the PST program. GSI also expressed concern

about ease of use of the interoffice memoranda that were issued since 1994 to add to or modify regulatory guidance documents RG-36 "Risk-Based Corrective Action for Leaking Storage Tank Sites" (January 1994) and RG-411 "Investigating and Reporting Releases from the Petroleum Storage Tanks" (December 1994).

The commission acknowledges the concern for effective guidance documents; however, it also points out that roughly two-thirds of the sites currently in the PST Program were discovered and reported before September 1, 2003 and are therefore still effectively using Chapter 334 and its associated guidance documents and interoffice memoranda. Minor revisions to Chapter 334 guidance and interoffice memoranda are expected in the normal course of updating such types of documentation. Returning all sites to Chapter 334 assessment and cleanup requirements (rather than part in TRRP and part not) will actually achieve more consistency within the PST Program. No changes were made to the rule in response to this comment.

Comments Regarding the Intent of House Bill 3554

Several commenters addressed the legislative amendments to the Texas Water Code contained in House Bill 3554, 80th Legislature, 2007. TPCA stated that the House Bill 3554's requirement that the commission use "risk-based corrective action" was introduced and adopted in response to the TCEQ's rule change a few years prior, requiring that sites discovered and reported after September 1, 2003, must use TRRP instead of the "risk-based corrective action" developed in Chapter 334. TPCA noted both the language of the bill and the statement of intent by the bill's author.

An individual and Lowerre expressed the position that House Bill 3554 did not require the TCEQ to amend its rules to remove LPST sites from the TRRP. Lowerre commented that even if the sponsor of the bill stated his intent orally in committee or on the floor, the legislative intent is not established unless explicitly stated in the language of the bill.

The commission responds that House Bill 3554 specifically directed the agency to use "risk-based corrective action." That term was defined in TWC, Chapter 26 before the TCEQ adopted the TRRP as a rule. Thus, the plain language of the bill refers to a phrase which has a specific definition in both the TWC and Chapter 334. Both during the legislative session and afterwards, the bill author communicated to members of the legislature and the TCEQ that the intent of the bill was to return the PST Program to the rules that had been used to clean up thousands of LPST sites. The particular Chapter 334 rules and guidance of concern here were originally proposed and adopted in 1995. House Bill 2587, 74th Legislature, 1995, effective September 1, 1995, significantly revised regulatory authority and responsibilities relative to USTs and ASTs. The rules proposed in July 1995 and adopted October 1995, officially incorporated "risk-based corrective action." This is the same risk-based corrective action program which this rule package uses for all current and future LPST sites. The commission has made no change to the rule in response to these comments.

Comments Regarding Regulatory Oversight Concerns

TxOGA stated that TRRP does not provide the TCEQ with timely information key to making risk-based decisions. If a responsible party chooses not to submit an Affected Property Assessment Report right away, TRRP allows him to submit a Self-Implementation Notice giving him no reporting requirements for three years. In contrast, Chapter 334 requires timely assessments and updates as plumes are delineated.

The commission responds that although the agency shares a general concern with ensuring that remediation projects are progressing around the state, the commission also values the private sector's ability to voluntarily comply with regulations. The agency takes note of TxOGA's point, and further notes that the requirements for reporting and oversight are reasonable in both Chapter 334 and Chapter 350. No changes to the rule was made in response to this comment.

SUBCHAPTER A. GENERAL INFORMATION

30 TAC §350.2, §350.4

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST) and TWC, §26.011, which requires the commission to control the quality of water by rule.

The adopted amendments implement TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or AST.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: March 19, 2009
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For further information, please call: (512) 239-2548

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SUBCHAPTER D. DEVELOPMENT OF PROTECTIVE CONCENTRATION LEVELS

30 TAC §350.77

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers

and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST) and TWC, §26.011, which requires the commission to control the quality of water by rule.

The adopted amendments implement TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or AST.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. REPORTS

30 TAC §350.91, §350.92

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST) and TWC, §26.011, which requires the commission to control the quality of water by rule.

The adopted amendments implement TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or AST.

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 3. TEXAS HIGHWAY PATROL

SUBCHAPTER D. TRAFFIC SUPERVISION

37 TAC §3.51

The Texas Department of Public Safety adopts amendments to §3.51, concerning Traffic Supervision on Interstate Highways in Cities of 50,000 Population or Less, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9938).

Adoption of the amendments to the section are necessary in order to change the word "accident" to "crash" in order to bring the rule into compliance with national standards.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.006(4), which authorizes the Director to adopt rules, subject to commission approval, considered necessary for control of the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stanley E. Clark
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CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER C. COMMERCIAL VEHICLE REGISTRATION AND INSPECTION ENFORCEMENT

37 TAC §4.37

The Texas Department of Public Safety adopts amendments to §4.37, concerning Acceptance of Out-of-State Commercial Vehicle Inspection Certificate, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9939).

Adoption of the first amendment to §4.37 is necessary in order to remove the State of Oklahoma from the list of jurisdictions certified by the Federal Motor Carrier Safety Administration as meeting the requirements of Title 49, Code of Federal Regulations, §396.23. Adoption of the second amendment to the section is necessary in order to add the State of Massachusetts to the list of jurisdictions certified by the Federal Motor Carrier Safety Administration as meeting the requirements of Title 49, Code of Federal Regulations, §396.23. Adoption of the final amendments to the section is necessary in order to clarify that only the bus inspection programs in the States of Connecticut and Wisconsin have been certified by the Federal Motor Carrier Safety Administration as meeting the requirements of Title 49, Code of Federal Regulations, §396.23.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §548.002, which authorizes the department to adopt rules to administer and enforce the compulsory inspection of vehicles.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 14. SCHOOL BUS SAFETY STANDARDS

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §14.1, §14.2

The Texas Department of Public Safety adopts the repeal of Chapter 14, Subchapter A, §14.1 and §14.2, concerning General Provisions of the School Bus Safety Standards, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9939).

Adoption of repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. Adoption of this repeal is filed simultaneously with the adoption of a new Subchapter A, §14.1 which promulgates revised general provisions for school bus safety standards.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. SCHOOL BUS DRIVER ELIGIBILITY AND APPLICATION PROCEDURES

37 TAC §§14.11 - 14.13

The Texas Department of Public Safety adopts the repeal of Chapter 14, Subchapter B, §§14.11 - 14.13, concerning School Bus Driver Eligibility and Application Procedures, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9940).

Adoption of repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. Adoption of this repeal is filed simultaneously with the adoption of a new Subchapter B, §§14.11 - 14.13, which promulgates revised regulations for school bus driver qualifications.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the depart-

ment's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. SCHOOL BUS DRIVER SAFETY TRAINING PROGRAM

37 TAC §§14.31 - 14.36

The Texas Department of Public Safety adopts the repeal of Chapter 14, Subchapter C, §§14.31 - 14.36, concerning School Bus Driver Safety Training Program, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9941).

Adoption of repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. Adoption of this repeal is filed simultaneously with the adoption of a new Subchapter C, §§14.31 - 14.36, which promulgates revisions to the school bus driver safety program.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. SCHOOL BUS SAFETY STANDARDS

37 TAC §§14.51 - 14.53

The Texas Department of Public Safety adopts the repeal of Chapter 14, Subchapter D, §§14.51 - 14.53, concerning School Bus Safety Standards, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9942).

Adoption of repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. Adoption of this repeal is filed simultaneously with the adoption of a new Subchapter D, §§14.51 - 14.54, which promulgates revised regulations for the school bus safety standards.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. ADVERTISING GENERAL PROVISIONS

37 TAC §§14.61 - 14.67

The Texas Department of Public Safety adopts the repeal of Chapter 14, Subchapter E, §§14.61 - 14.67, concerning Advertising General Provisions, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9942).

Adoption of repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. Adoption of this repeal is filed simultaneously with the adoption of a new Subchapter E, §§14.61 - 14.65, which promulgates revised regulations for the advertising requirements on school buses.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §547.701(d), which authorizes the department to adopt rules to regulate the display of advertising on the exterior of a school bus.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §14.1

The Texas Department of Public Safety adopts new Chapter 14, Subchapter A, §14.1, concerning General Provisions, with changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9943) and will be republished.

Adoption of new §14.1 is necessary in order to establish definitions for certain terms that are used throughout Chapter 14, School Bus Safety Standards. The new section is filed simultaneously with an adoption for the repeal of current Subchapter A, §14.1 and §14.2 and is necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

The department accepted comment on the proposed rules through January 5, 2009. Written comments were submitted by Jim Dunlap and Keith A. Kaup representing Texas Association for Pupil Transportation (Gulf Coast Chapter); Patrick Garcia representing Education Service Center Region XI; Lou Autry representing Education Service Center Region X; Carolyn Tipton representing Education Service Center Region XV; Charley Kennington representing Education Service Center Region IV; Don Archer representing Education Service Center Region VI; Crystal Dockery representing Education Service Center Region XVI; Kenneth L. Coleman representing Borger Independent School District; and Kirk A. Self representing Canyon Independent School District.

The substantive comments, as well as the department's responses thereto, are summarized below:

COMMENT: Regarding §14.1. "Could examples of the Department's interpretation of 'any communication brought to the attention of the public in return for public recognition in connection with an event' be given? For example, is the school logo considered advertisement?"

RESPONSE: The department agrees with the comment and clarifies a school districts name and/or school or manufacturer logos are not to be considered advertisement for the purposes of compliance with §14.61 (School Bus Advertisement Applicability). The necessary change to the definition of "Advertisement" has been made in paragraph (1).

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

§14.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Advertisement--Any communication brought to the attention of the public by paid announcement or in return for public recognition in connection with an event or offer or sale of a product or service, except for a single-line listing of a school district name and/or school or manufacturer logo approved by the department.

(2) Department--The Texas Department of Public Safety.

(3) Director--The director of the Texas Department of Public Safety or the designee of the director.

(4) Enrollment certificate--A valid provisional certificate issued by a training agency under the authority of the director indicating a person has enrolled in the School Bus Driver Safety Training

Program as described in §14.36 of this title (relating to Enrollment Certificates) and meets the requirements designated therein.

(5) Medical advisory board--The Medical Advisory Board of the Texas Department of State Health Services.

(6) Medical examiner--A person who is licensed, certified, and/or registered, in accordance with applicable State laws and regulations, to perform physical examinations. The term includes, but is not limited to, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic.

(7) Multifunction school activity bus--A motor vehicle that was manufactured in compliance with the federal motor vehicle safety standards for school buses in effect on the date of manufacture other than the standards requiring the bus to display alternately flashing red lights and to be equipped with movable stop arms, and that is used to transport preprimary, primary, or secondary students on a school-related activity trip other than on routes to and from school. The term does not include a school bus, a school activity bus, a school-chartered bus, or a bus operated by a mass transit authority.

(8) School activity bus--A bus designed to accommodate more than 15 passengers, including the operator, that is owned, operated, rented, or leased by a school district, county school, open-enrollment charter school, regional education service center, or shared services arrangement and that is used to transport public school students on a school-related activity trip, other than on routes to and from school. The term does not include a chartered bus, a bus operated by a mass transit authority, a school bus, or a multifunction school activity bus.

(9) School bus--A motor vehicle that was manufactured in compliance with the federal motor vehicle safety standards for school buses in effect on the date of manufacture and that is used to transport pre-primary, primary, or secondary students on a route to or from school or on a school-related activity trip other than on routes to and from school. The term does not include a school-chartered bus or a bus operated by a mass transit authority.

(10) School bus driver--A driver transporting school children and/or school personnel on routes to and from school or on a school-related activity trip while operating a multifunction school activity bus, school activity bus, or school bus.

(11) Training agency--The twenty Regional Education Service Centers of the Texas Education Agency approved by the department to teach the School Bus Driver Safety Training Program.

(12) Training certificate--A document issued under the authority of the director to a person indicating successful completion of the School Bus Driver Safety Training Program approved by the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. SCHOOL BUS DRIVER QUALIFICATIONS

37 TAC §§14.11 - 14.13

The Texas Department of Public Safety adopts new Chapter 14, Subchapter B, §§14.11 - 14.13, concerning School Bus Driver Qualifications, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9944).

Adoption of the new sections is necessary in order to set forth employment qualification requirements for drivers of school buses, school activity buses, and multifunction school activity buses. The new sections are adopted simultaneously with an adoption for repeal of current Subchapter B, §§14.11 - 14.13 and are necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

The department accepted comment on the proposed rules through January 5, 2009. No comments were received regarding adoption of new §§14.11 - 14.13.

The new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. SCHOOL BUS DRIVER SAFETY TRAINING PROGRAM

37 TAC §§14.31 - 14.36

The Texas Department of Public Safety adopts new Chapter 14, Subchapter C, §14.31, and §14.33, concerning School Bus

Driver Safety Training Program, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9947) and will not be republished. Sections 14.32 and 14.34 - 14.36 are adopted with changes and will be republished.

Adoption of the new sections is necessary in order to set forth the requirements of the driver safety training program for drivers of school buses, school activity buses, and multifunction school activity buses. The new sections are adopted simultaneously with an adoption for repeal of current Subchapter C, §§14.31 - 14.36 and are necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

The department accepted comment on the proposed rules through January 5, 2009. Written comments were submitted by Jim Dunlap and Keith A. Kaup representing Texas Association for Pupil Transportation (Gulf Coast Chapter); Patrick Garcia representing Education Service Center Region XI; Lou Autry representing Education Service Center Region X; Carolyn Tipton representing Education Service Center Region XV; Charley Kennington representing Education Service Center Region IV; Don Archer representing Education Service Center Region VI; Crystal Dockery representing Education Service Center Region XVI; Kenneth L. Coleman representing Borger Independent School District; and Kirk A. Self representing Canyon Independent School District.

The substantive comments, as well as the department's responses thereto, are summarized below:

COMMENT: Regarding §14.32. Requests were received to modify the current thirty five (35) individual class sizes to a range of eighteen (18) to sixty (60) trainees per certified instructor.

RESPONSE: The department disagrees with the comment and feels a maximum classroom size of thirty five (35) per certified instructor is optimal to ensure the best possible learning environment. Therefore, no change was made to the rule based on this comment.

COMMENT: Regarding §14.32. Requests were received to include the wording "a minimum of" twenty (20) and eight (8) clock hours of instruction shall consist of the safety training program.

RESPONSE: The department agrees with the comment and has amended the language.

COMMENT: Regarding §14.32. Depending on the location and resources available it could take more than two (2) business days notification to accommodate the needs for persons with certain disabilities. Requests were received to extend the current two (2) business days to seven (7) business days or twenty (20) business days.

RESPONSE: The department agrees with the comment and feels seven (7) business days is a sufficient amount of time. Therefore, the language has been amended.

COMMENT: Regarding §14.32. Education Service Centers would have a financial hardship in sending the department the enormous amount of evaluations given each year. In addition, due to Education Service Center in-house processing procedures, it would not be possible to send course evaluations within fourteen (14) calendar days.

RESPONSE: The department agrees to withdraw the proposed language for submission of evaluation reports to the department.

COMMENT: Regarding §14.34. In order not to cause additional reporting time and undue hardship, Education Service Centers requested the reporting time for submission of instructor certification information be extended from fifteen (15) to thirty (30) calendar days.

RESPONSE: The department agrees with the comment and amends the proposed language.

COMMENT: Regarding §14.35. In order not to cause additional reporting time and undue hardship, Education Service Centers requested the reporting time for submission of school bus driver certification information including certificate issuance be extended from fourteen (14) to thirty (30) calendar days.

RESPONSE: The department agrees with the comment and amends the proposed language.

COMMENT: Regarding §14.35. The wording "six month (180 day)" period could mean more or less than 180 days, depending upon the months.

RESPONSE: The department agrees with the comment and amends the proposed language.

COMMENT: Regarding §14.35. Clarification is needed to determine if the reference to "certification" is the twenty (20) or eight (8) hour certification course for reinstate status during the 12 month interval immediately following certification expiration.

RESPONSE: The department agrees the wording creates an ambiguity and will include the term "initial" for further clarification.

COMMENT: Regarding §14.36. In order not to cause additional reporting time and undue hardship, Education Service Centers requested the reporting time for submission of school bus driver enrollment certification information including enrollment certificate issuance be extended from fourteen (14) to thirty (30) calendar days.

RESPONSE: The department agrees with the comment and amends the proposed language.

The new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

§14.32. School Bus Driver Safety Training Program.

The school bus driver safety training program shall be provided in accordance with the following requirements:

(1) the school bus driver safety training program shall be administered by the approved training agency;

(2) the department shall have primary responsibility for program content, monitoring, and regulation; and for providing technical assistance to the training agency;

(3) program standards for providing school bus driver safety training shall include the following:

(A) the initial certification safety training course, Course Guide for School Bus Driver Training in Texas, shall consist of a minimum of twenty clock-hours of instruction;

(B) the recertification safety training course, Texas School Bus Driver Safety Training Recertification Course, shall consist of a minimum of eight clock-hours of instruction;

(C) individual class sessions shall be limited in duration to a maximum of four hours of instruction on a workday and eight hours of instruction on a non-workday. Rest breaks of no more than ten minutes are permitted between each consecutive hour of instruction;

(D) enrollment for individual classes shall be limited to a maximum of 35 trainees per certified instructor. A minimum of one certified instructor shall be in attendance during any class session;

(E) when scheduling and registering for classes, priority shall be given to those persons holding an enrollment certificate;

(F) reasonable accommodations may be requested for persons with certain disabilities who attend training classes and need auxiliary aids or services, such as an interpreter for the deaf or hearing impaired. Such requests should be directed to the appropriate training agency at least seven business days prior to the start of course instruction so that appropriate arrangements can be made;

(G) each trainee shall be given the opportunity to complete a course evaluation report at the end of each session; and

(H) any modifications to the program standards for the School Bus Driver Safety Training Program shall not be implemented by the training agency without prior approval of the department.

§14.34. Instructor Certification.

(a) To be eligible for instructor certification, an applicant must possess at least one of the following prerequisites:

(1) a valid "Texas Teacher Certificate";

(2) a minimum of two years of administrative or supervisory experience in school transportation; or

(3) a minimum of two years of work experience or study in driver training, traffic safety education, or a related field.

(b) In addition to the prerequisite(s) in subsection (a) of this section, an applicant may qualify for instructor certification only after meeting all of the following requirements:

(1) complete the certification course;

(2) serve as a student instructor for a certification course while practice teaching under the direct supervision of a currently certified instructor; and

(3) receive official approval from the sponsoring training agency.

(c) Upon satisfactory completion of all requirements, the training agency shall issue a qualified applicant an "Instructor's Certificate for School Bus Driver Safety Training in Texas", and properly submit the necessary verification information electronically to the department no later than thirty calendar days after issuance.
Figure: 37 TAC §14.34(c)

(d) Except as approved by the department, each instructor must teach a minimum of one certification course and one recertification course each calendar year in order to maintain current instructor certification status.

§14.35. School Bus Driver Certification.

(a) To obtain full initial school bus driver certification, a person must satisfactorily complete the certification course. The training agency shall issue a "Texas School Bus Driver Safety Training Certificate," and submit the necessary verification information electronically to the department within thirty days of course completion.
Figure: 37 TAC §14.35(a)

(b) Driver certification will remain valid for a period of three years as indicated by the expiration date on the certificate.

(c) Every school bus driver must hold a valid certificate stating that they have completed, or are enrolled in, the approved school bus driver safety training course.

(d) Any school bus driver whose certification has expired shall not operate a school bus, school activity bus, or multifunction school activity bus until such time as they become recertified or obtain an enrollment certificate. The following rules shall apply to certification renewals:

(1) To avoid a lapse in certification, the recertification course must be completed prior to expiration. The recertification course shall be completed during the 180 day period immediately preceding certification expiration. If the required training is completed within this preferred time interval, certification will then be renewed for a period of three years from the upcoming expiration date indicated on the current certificate.

(2) If the recertification course is completed more than 180 days prior to certification expiration, certification will then be renewed for a period of three years from the actual date of course completion.

(3) During the 12-month interval immediately following certification expiration, the recertification course may be completed for certification renewal. Certification will then be renewed for a period of three years from the actual date of course completion. Failure to satisfactorily complete the recertification course during this time frame will require completion of the initial certification course to reinstate certification status. During this time period, a person shall not drive a school bus, school activity bus, or multifunction school activity bus unless he/she has received an enrollment certificate. Issuance of an enrollment certificate during this dormant time interval will require the successful completion of the certification course in order to reinstate full certification status.

(e) Regardless of the reason, any course instruction missed must be completed by arrangement with the training agency. Except as approved by the training agency, all course requirements for certification must be completed within the 180-day period immediately following the start of instruction, otherwise no credit will be given for any class sessions previously attended. The entire course must be completed prior to awarding certification.

§14.36. Enrollment Certificate.

(a) A training agency may grant a qualified applicant temporary and provisional certification status in the form of an "Enrollment Certificate" upon receipt of a completed application from the requesting employer stating that this person has fulfilled all of the following eligibility requirements:

(1) at least 18 years of age;

(2) possess a valid driver's license designating a class appropriate (with applicable endorsements, if commercial driver license) for the gross vehicle weight rating and manufacturer's designed passenger capacity of motor vehicle to be operated;

(3) an acceptable driving record determined in accordance with §14.14 of this title (relating to Minimum Driving Record Qualifications);

(4) an acceptable criminal history record, secured from any law enforcement agency or criminal justice agency, and reviewed in accordance with the provisions of current state statute (see Chapter 22 of the Texas Education Code);

(5) meets the medical qualifications as specified in §14.12 of this title (relating to Medical Qualifications) and any pre-employment testing in accordance with current federal law; and

(6) each employer must ensure that all school bus drivers have an acceptable level of knowledge and skill regarding the safe operation of school buses, school activity buses, and/or multifunction school activity buses. It is the employer's inherent responsibility to ensure that the driver understands the contents of Units II, IV, V, VIII and X of the current Course Guide for School Bus Driver Training in Texas.

Figure: 37 TAC §14.36(a)(6)

(b) In addition to the prerequisites listed in subsection (a) of this section, the following rules shall apply to the issuance of all enrollment certificates:

(1) recipients must register for the first available twenty-hour certification course as determined by the training agency. Except as approved by the training agency, failure to satisfactorily complete the school bus driver certification course as scheduled shall result in revocation of the enrollment certificate;

(2) enrollment certificates shall be dated to expire no later than 180 days past the date issued. Except as approved by the training agency, a minimum of five years must elapse between the issuance of consecutive enrollment certificates;

(3) an enrollment certificate shall be similar to the standard school bus driver safety training certificate and contain the words, "Enrollment Certificate" either stamped or printed diagonally across the face of the training certificate; and

(4) the training agency shall submit to the department the necessary verification information electronically for all enrollment certifications within thirty days of issuance.

Figure: 37 TAC §14.36(b)(4)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 26, 2009.

TRD-200900874
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: March 18, 2009
Proposal publication date: December 5, 2008
For further information, please call: (512) 424-2135

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SUBCHAPTER D. SCHOOL BUS SAFETY STANDARDS

37 TAC §§14.51 - 14.54

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 37 TAC §14.52(a) is not included in the print version of the Texas Register. The figure is available in the on-line version of the March 13, 2009, issue of the Texas Register.)

The Texas Department of Public Safety adopts new Chapter 14, Subchapter D, §§14.51, 14.53, and 14.54, concerning School Bus Safety Standards, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9949) and will not be republished. Section 14.52 is adopted with changes and will be republished.

Adoption of the new sections is necessary in order to set forth the vehicle equipment specifications for school buses, school activity buses, and multifunction school activity buses operated in the State of Texas. The new sections also implement the requirement of House Bill 3190, as passed by the 80th Texas Legislature, pertaining to school bus emergency evacuation training. The new sections are adopted simultaneously with an adoption for repeal of current Subchapter D, §§14.51 - 14.53 and are necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

The department accepted comment on the proposed rules through January 5, 2009. Written comments were submitted by Jim Dunlap and Keith A. Kaup representing Texas Association for Pupil Transportation (Gulf Coast Chapter); Patrick Garcia representing Education Service Center Region XI; Lou Autry representing Education Service Center Region X; Carolyn Tipton representing Education Service Center Region XV; Charley Kennington representing Education Service Center Region IV; Don Archer representing Education Service Center Region VI; Crystal Dockery representing Education Service Center Region XVI; Kenneth L. Coleman representing Borger Independent School District; and Kirk A. Self representing Canyon Independent School District.

The substantive comments, as well as the department's responses thereto, are summarized below:

COMMENT: Regarding §14.52. The Texas School Bus Specifications were developed and derived for a motor vehicle (school bus) that is used to transport pre-primary, primary, or secondary students on routes to and from school or on a school related activity trip other than on routes to and from school. By definition, a school activity bus is not a "school bus" or "multifunction school activity bus" and cannot be held in compliance with the Texas School Bus Specifications.

RESPONSE: The department agrees with the comment and states the term school activity bus and multifunction school activity bus were included inadvertently. The necessary change has been made to the section.

The new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus;

§547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

§14.52. Texas School Bus Specifications.

(a) All school bus chassis and body manufacturers shall certify to the department, in the form of a letter, that all school buses offered for sale to or use by the public school systems in Texas meet or exceed all standards, specifications, and requirements as specified in the department's publication Texas School Bus Specifications. The department hereby adopts the Texas School Bus Specifications for 2008 Model School Buses. Previously published Texas School Bus Specifications remain in effect for earlier model year school buses until the department repeals these publications.

Figure: 37 TAC §14.52(a)

(b) All school bus chassis and body manufacturers shall certify to the department, in the form of a letter, that all multifunction school activity buses offered for sale to or use by the public school systems in Texas meet or exceed all federal standards, specifications, and requirements of a multifunction school activity bus as specified in the Title 49, Code of Federal Regulations, Part 571.

(1) A multifunction school activity bus may be painted any color except National School Bus Glossy Yellow.

(2) A multifunction school activity bus cannot be used for home to school or school to home transportation. Before delivery of a multifunction school activity bus, the manufacturer must place a label in the direct line of site of the driver while seated in the driver's seat stating: "This vehicle is not to be used for home to school or school to home transportation".

(c) Any new school bus found out of compliance with the specifications that were in effect in Texas on the date the vehicle was manufactured will be placed out of service by the vehicle's owner until it is brought into compliance with the applicable specifications.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 26, 2009.

TRD-200900876
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: March 18, 2009
Proposal publication date: December 5, 2008
For further information, please call: (512) 424-2135

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SUBCHAPTER E. ADVERTISING REQUIREMENTS

37 TAC §§14.61 - 14.65

The Texas Department of Public Safety adopts new Chapter 14, Subchapter E, §§14.62 - 14.65, concerning Advertising Requirements, without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9951) and will not be republished. Section 14.61 is adopted with changes and will be republished.

Adoption of the new sections is necessary in order to set forth the advertising display requirements for school buses. The new sections also establish a traffic crash reporting requirement for school buses that are displaying exterior advertising. The new sections are adopted simultaneously with an adoption for repeal of current Subchapter E, §§14.61 - 14.67 and are necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

The department accepted comment on the proposed rules through January 5, 2009. Written comments were submitted by Jim Dunlap and Keith A. Kaup representing Texas Association for Pupil Transportation (Gulf Coast Chapter); Patrick Garcia representing Education Service Center Region XI; Lou Autry representing Education Service Center Region X; Carolyn Tipton representing Education Service Center Region XV; Charley Kennington representing Education Service Center Region IV; Don Archer representing Education Service Center Region VI; Crystal Dockery representing Education Service Center Region XVI; Kenneth L. Coleman representing Borger Independent School District; and Kirk A. Self representing Canyon Independent School District.

The substantive comments, as well as the department's responses thereto, are summarized below:

COMMENT: Regarding §14.61. It appears to be the intent of TRC 547.701(d) to regulate the advertising only on school buses that are used on routes for home to school and school to home transportation since that is the great danger for the school children while they are loading and unloading on a highway or street.

RESPONSE: The department agrees with the comment and states the term school activity bus and multifunction school activity bus were included inadvertently. The necessary change has been made to the section.

The new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §547.701(d), which authorizes the department to adopt rules to regulate the display of advertising on the exterior of a school bus.

§14.61. Applicability.

This subchapter is applicable to all school buses used to transport preprimary, primary, and secondary public school students.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 26, 2009.

TRD-200900875
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: March 18, 2009
Proposal publication date: December 5, 2008
For further information, please call: (512) 424-2135

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 24. TRANS-TEXAS CORRIDOR
SUBCHAPTER B. DEVELOPMENT OF FACILITIES

43 TAC §24.13

The Texas Department of Transportation (department) adopts amendments to §24.13, concerning corridor planning and development. The amendments to §24.13 are adopted without changes to the proposed text as published in the January 2, 2009, issue of the *Texas Register* (34 TexReg 38) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The Texas Transportation Commission (commission) creates corridor segment committees for proposed segments of the Trans-Texas Corridor or certain transportation facilities that may become segments of the Trans-Texas Corridor to provide input, advice, and recommendations to the commission and the department regarding the designation of a route for the segment for which the committee was created and the construction of the proposed segment of the Trans-Texas Corridor or a facility that may become all or part of the segment.

As the commission recently began to consider representation on corridor segment committees, it became apparent that some organizations that have an interest in the transportation facilities and within whose service areas the proposed corridor segments will be located do not qualify for representation on the applicable committee under current 43 TAC §24.13.

Amendments to §24.13, Corridor Planning and Development, modify subsection (c)(2)(D) to add to the entities that the commission may designate for representation on a corridor segment committee, an organization, regardless of how it is formed, that has an interest in transportation and whose service area includes a part of the proposed segment and to provide the commission with the authority to appoint to the committee additional members who reside or have businesses in the area of the proposed segment and who have an interest in transportation. These changes give the commission the flexibility to add members to a corridor segment committee that represent a wide range of entities that have special interest in transportation in the area and that will be affected by the proposed segment of the Trans-Texas Corridor or a facility that may become a part of the corridor but that under the current rules are not allowed representation on the committee. The additional members will ensure that a committee represents the interests of local and regional groups and individuals that have an interest in where a segment or facility is located and whether it will be constructed.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §227.002, which provides the commission with the authority to adopt rules as necessary or convenient to implement and administer Transportation Code, Chapter 227.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 227.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 27, 2009.

TRD-200900882
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: March 19, 2009
Proposal publication date: January 2, 2009
For further information, please call: (512) 463-8683

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Review

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 108 concerning Fees. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules.

§108.1. Charges for Copies of Public Information.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on April 13, 2009 and submitted to Victoria Ortega, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-200900925
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: March 4, 2009

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Adopted Rule Review

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 30, Administration, Subchapter AA, Commissioner of Education: General Provisions, and Subchapter BB, Commissioner of Education: Purchasing and Contracts, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 30, Subchapters AA and BB, in the December 12, 2008, issue of the *Texas Register* (33 TexReg 10193).

The TEA finds that the reasons for adopting 19 TAC Chapter 30, Subchapters AA and BB, continue to exist and readopts the rules. The TEA received no comments related to the rule review requirement.

The TEA is proposing an amendment to 19 TAC Chapter 30, Subchapter AA. Section 30.1001, Petition for Adoption of Rule Changes, would be modified to adopt in rule as a figure the form used to petition for the adoption of rule changes. The proposed amendment to 19 TAC Chapter 30, Subchapter AA, may be found in the Proposed Rules section of this *Texas Register* issue.

Relating to the review of 19 TAC Chapter 30, Subchapter BB, the TEA plans to propose rule changes at a later date to update 19 TAC §30.2001, Historically Underutilized Business (HUB) Program, to reflect the transfer of HUB rules from the Texas Building and Procurement Commission to the Comptroller of Public Accounts.

This concludes the review of 19 TAC Chapter 30.

TRD-200900893
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 27, 2009

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §25.475(g)(6)

Electricity Facts Label (EFL)

{Name of REP}, {Name of Product}, {Service area *(if applicable)*}, {Date}

Electricity price

Average Monthly Use	500kWh	1,000kWh	2,000kWh
Average price per kWh	{x.x}¢	{x.x}¢	{x.x}¢
For POLR use: Minimum price per kilowatt-hour.	{x.x}¢	{x.x}¢	{x.x}¢

{If applicable} On-peak {season or time}:{xxx}

{If applicable} Average on-peak price per kilowatt-hour: {x.x}¢

{If applicable} Average off-peak price per kilowatt-hour: {x.x}¢

{If applicable} Potential surcharges corresponding to the given electric service.

{If variable that does not change within a defined percentage} This price is the price that will be applied during your first billing cycle; this price may change in subsequent months at the sole discretion of {insert REP name}.

{If residential} Please review the historical price of this product available at {insert website address and toll-free number}.

{If variable that changes within a defined percentage} This price is the price that will be applied during your first billing cycle; this price may increase by no more than {insert percentage} percent from month-to-month.

{If residential} Please review the historical price of this product available at {insert website address and toll-free number}.

Other Key Terms and questions

See Terms of Service statement for a full listing of fees, deposit policy, and other terms.

Disclosure Chart	Type of Product	(fixed rate indexed or variable)
	Contract Term	(number of months)
	Do I have a termination fee or any fees associated with terminating service?	(yes/no) (if yes, how much)
	Can my price change during contract period?	(yes/no)
	If my price can change, how will it change, and by how much?	(formula/description of the way the price will vary and how much it can change)
	What other fees may I be charged?	(List, or give direct location in TOS.)
	Is this a pre-pay or pay in advance product	(yes/no)
	Does the REP purchase excess distributed renewable generation?	(yes/no)
	Renewable Content	(This product is x% renewable)
	The statewide average for renewable content is	(% of statewide average for renewable content)
	Contact info, certification number, version number o	

Type used in this format
Title: 12 point
Headings: 12 point boldface
Body: 10 point

Figure: 16 TAC §25.476(f)(5)(B)(ii)

SRR / TS,

where

SRR = the statewide REC requirement, in MWh, as calculated by the REC Trading Program Administrator for the compliance period coinciding with the EFL, and

TS = total MWh sales for all REPs to Texas customers during the compliance period coinciding with the EFL.

Figure: 16 TAC §311.5(c)

Type of License	1 Year Fee	2 Year Fee	3 Year Fee
Adoption Program Personnel	$25		
Announcer	$35		
Apprentice Jockey	$75		
Assistant Farrier/Plater/Blacksmith	$25		
Assistant Starter	$25		
Assistant Trainer	$100		
Assistant Trainer/Owner	$100		
Association Assistant Management	$50		
Association Management Personnel	$75		
Association Officer/Director	$100		
Association Other	$50		
Association Staff	$35		
Association Veterinarian	$75		
Authorized Agent	$15		
Chaplain	$25		
Chaplain Assistant	$25		
Exercise Rider	$25		
Farrier/Plater/Blacksmith	$75		
Groom/Hot Walker	$25		
Jockey	$100	$200	$300
Jockey Agent	$100		
Kennel	$75		
Kennel Helper	$25		
Kennel Owner	$100	$200	$300
Kennel Owner/Owner	$100	$200	$300
Kennel Owner/Owner-Trainer	$100	$200	$300
Kennel Owner/Trainer	$100	$200	$300
Lead-Out	$25		
Maintenance	$35		
Medical Staff	$35		
Miscellaneous	$25		
Multiple Owner	$35	$70	$100
Mutuel Clerk	$35		
Mutuel Other	$35		
Owner	$100	$200	$300
Owner-Trainer	$100	$200	$300
Pony Person	$25		
Racing Industry Representative	$100		
Racing Industry Staff	$30		
Racing Official	$50		
Security Officer	$30		
Stable Foreman	$50		
Tattooer	$100		
Test Technician	$25		
Tooth Floater	$100		
Trainer	$100	$200	$300

Training Facility Employee	$30		
Training Facility General Manager	$50		
Valet	$25		
Vendor Concessionaire	$100		
Vendor/Concessionaire Employee	$30		
Vendor Totalisator	$500		
Vendor/Totalisator Employee	$50		
Veterinarian	$100	$200	$300
Veterinarian Assistant	$30		

Figure: 19 TAC §30.1001(a)

COMMISSIONER OF EDUCATION
Petition for Adoption of a Rule

The Texas Government Code, §2001.021, provides that any interested person may petition an agency requesting the adoption of a rule.

Petitions should be signed and submitted to:

Commissioner of Education
Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494

Name:

Affiliation/Organization (if applicable):

Address:

Telephone: Date:

Proposed rule text (indicate words to be added or deleted from the current text):

Statutory authority for the proposed rule action:

Why is this rule action necessary or desirable?

(If more space is required, attach additional sheets.)

Petitioner's Signature

Figure: 37 TAC §14.14(d)

TABLE I
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **one (1) penalty point** for each conviction if the date of the violation is within three (3) years of the date of the driving record evaluation.

Brakes not on all wheels required
Carry passenger without a helmet
Clearance lamps improperly mounted
Clearance lights not visible sufficient distance
Defective parking lamp(s)
Defective safety glazing material
Defective stop lamp(s)
Defective tail lamp(s)
Defective turn signal lamps
Defective windshield wiper
Driving safety course sec. 143(a)(1)
Hazardous material placard violation
Head lamps glaring not adjusted
Identification lamps not visible sufficient distance
Improper flashing lights
Improper use of back-up lamp
Improperly directed or adjusted lamp(s)
Mirror violation
More than four driving lamps lighted
Muffler violation
No automatic brake application on breakaway (trailer)
No beam indicator
No clearance lamps
No fire extinguisher
No front seat belts (when required)
No head lamp(s) - not equipped
No motorcycle endorsement
No mud flaps or improper mud flaps
No multiple-beam road lighting equipment
No parking lamps
No reflector(s) when required
No stop lamps
No tail lamp(s) - not equipped
No turn signal lamps when required
No white flag on tow chain (or cable)
No windshield wiper
Pull more than one trailer or other vehicle
Red light(s) on front
Reflectors improperly mounted
Reflectors not visible sufficient distance
Side marker lamps not visible sufficient distance
Slow-moving vehicle emblem violation

TABLE I (continued)
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **one (1) penalty point** for each conviction if the date of the violation is within three (3) years of the date of the driving record evaluation.

Tail lamp(s) improperly located
Too many auxiliary driving lamps
Too many auxiliary passing lamps
Too many fog lamps
Too many spot lamps
Unauthorized glass coating material
Unauthorized use of siren, bell or whistle
Warning devices not installed or defective

Wrong color back-up lamp
Wrong color clearance lamp(s)
Wrong color identification lamps
Wrong color license plate light
Wrong color reflectors
Wrong color side marker
Wrong color signal device
Wrong color spotlight

TABLE II
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **two (2) penalty points** if the date of occurrence is within three (3) years of the date of the driving record evaluation. Persons disqualified because of penalty points assessed for crash* involvement shall be notified of their right to a review. (See below for review procedure)

Accident

Accident citation issued

Accident fatal

Accident incapacitating injury

Accident non-incapacitating injury

Accident non-injury

Accident no citation issued

Accident possible injury

REVIEW PROCEDURE FOR DISQUALIFICATION APPEAL
(2 point penalty assessments under Table II)

Two (2) points shall automatically be assessed for a crash involvement occurring within three (3) years of the date of the driver record evaluation which appears on the driver history record. Applicants disqualified on the basis of penalty points assessed for crash involvements appearing on their driving record may request a review by the person(s) designated by the employer to determine if they were a cause of the crash(es). The applicant must identify the specific crash involvement(s) to be reviewed. Request a copy of the crash report(s) on the approved form. Mail the form to Crash Records, Texas Department of Transportation at the address listed on the form.

The designated person(s) shall review information pertinent to the crash(es), which should include the **Texas Peace Officer's Crash Report**. In examining this report, consideration of such items as Charges Filed, Investigators' Narrative of What Happened, Diagram, and Factors/Conditions Contributing to the Crash should assist in making a determination as to whether or not the assessment of penalty points is appropriate.

If the designated person(s) reviews the crash report and any other pertinent information and determines that the applicant was not a cause of the crash(es), no penalty points should be assessed. If the designated person(s) determines that the applicant was a cause of the crash(es), two (2) penalty points shall be assessed for each crash.

*The terms "crash" and "accident" shall be used interchangeably.

TABLE III
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **three (3) penalty points** for each conviction if the date of violation is within three (3) years of the date of the driving record evaluation.

Bus driver failed to activate warning signal/equipment

Bus failed to stop at RR crossing

Bus shifting gears while crossing RR tracks

Careless driving

Changed lane when unsafe

Child (4-17) not secured by safety belt

Coasting

Consume alcohol while driving

Crossed RR with heavy equipment without notice

Crossed RR with heavy equipment without stop (or safety)

Crossing physical barrier

Cut across driveway to make turn

Cut corner left turn

Cut in after passing

Did not use designated lane or direction

Display fictitious driver license

Disregarded flashing red signal (at stop sign, etc.)

Disregarded flashing yellow light

Disregarded lane control signal

Disregarded no lane change sign

Disregarded no passing zone

Disregarded police officer

Disregarded RR crossing gate or flagman

Disregarded signal at RR crossing

Disregarded traffic control device

Disregarded turn marks at intersection

Disregarded warning sign at construction

Drawbar over 15 feet

Driver opened door in moving traffic

Drove on or across streetcar track where prohibited

Drove on sidewalk

Drove on wrong side of divided highway

Drove on wrong side of road

Drove onto (or from) controlled access highway where prohibited

Drove through safety zone

Drove to left of rotary traffic island

Drove without lights-when required

Drove wrong way in designated lane

Drove wrong way on one-way roadway

Endorsement violation CMV

Fail to comply with requirements on striking fixtures on highway

Fail to comply with requirements on striking unattended vehicle

TABLE III (continued)
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **three (3) penalty points** for each conviction if the date of violation is within three (3) years of the date of the driving record evaluation.

Fail to control speed
Fail to dim headlights-following
Fail to dim headlights-meeting
Fail to drive in single lane
Fail to keep right on mountain roadway
Fail to signal for stop
Fail to signal required distance before turning
Fail to signal with turn indicator
Fail to sound horn-mountain road
Fail to stop at marked RR crossing
Fail to stop at proper place (at traffic light)
Fail to stop at proper place (flashing red signal)
Fail to stop at proper place (not intersection)
Fail to stop for school bus (or remain stopped, specify)
Fail to stop-designated point-at yield sign
Fail to stop-emerging from alley, driveway or building
Fail to use due care for pedestrian
Fail to use proper headlight beam
Fail to yield at stop intersection
Fail to yield at yield intersection
Fail to yield for blind or incapacitated person
Fail to yield right of way
Fail to yield right of way - changing lanes
Fail to yield right of way - turning right on red signal
Fail to yield right of way at open intersection (specify type)
Fail to yield right of way leaving (private drive, alley, building)
Fail to yield right of way on left at obstruction
Fail to yield right of way to emergency vehicle
Fail to yield right of way to pedestrian at signal intersection
Fail to yield right of way to pedestrian in crosswalk
Fail to yield right of way to pedestrian in crosswalk-no signal
Fail to yield right of way to pedestrian on sidewalk
Fail to yield right of way to pedestrian-green arrow signal
Fail to yield right of way-turning left (at intersection, alley, private road or driveway)
Failed to give one-half of roadway
Failed to give way when overtaken
Failed to pass met vehicle to right
Failed to stop for approaching train
Failed to stop for streetcar-or stop at wrong location
Fleeing from police officer
Following ambulance

TABLE III (continued)
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **three (3) penalty points** for each conviction if the date of violation is within three (3) years of the date of the driving record evaluation.

Following too closely - following too closely truck
following too closely - caravan
Heavy equipment disregarded signal of train
Illegal backing
Illegal load extension
Illegal pass on right
Illegally passed streetcar
Impeding traffic
Improper lane change
Improper lookout
Improper turn
Improper turn or stop hand signal
Improper use of auxiliary driving lamps
Improper use of fog lamps
Improper use of spot lamps
Increased speed while being overtaken
Interfere with funeral procession
Interfere with streetcar
Lack of caution on green arrow signal
Made a U-turn on curve or hill
No drivers license
No flag or projecting load-daytime
No lamps (or reflectors) on project load at night
No seat belt-driver
No seat belt-passenger
Obstructed view through windshield
Obstructing traffic
Operate motorcycle without approved headgear
Operate vehicle where prohibited
Operate vehicle with child in open bed
Parked double
Parked on a bridge or in a tunnel
Parked on crosswalk
Parked on grade-failed to turn wheels
Parked on roadway
Parked with headlamps not dimmed
Parked within an intersection
Parked without lights
Parked without locking ignition and/or removing key
Passed through barricade
Passed vehicle stopped for pedestrian
Passed-insufficient clearance

TABLE III (continued)
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **three (3) penalty points** for each conviction if the date of violation is within three (3) years of the date of the driving record evaluation.

Passengers/load obstruct drivers view or control

Prohibited motor vehicle on controlled-access highway

Racing-drag racing-acceleration contest, etc.

Ran red light

Ran stop sign

Reckless driving

Restriction violation-CDL

Slower vehicle failed to keep right

Speed under minimum

Speeding

Speeding-10 mph maximum for solid tire

Speeding-15 miles or over

Speeding 10% or over

Speeding over limit

Speeding-in a school zone

Too many riders on motorcycle

Turned across dividing section

Turned left from wrong lane

Turned right from wrong lane

Turned right too wide

Turned when unsafe

Unrestrained child under 4 or less than 36 inches in height not secured by child passenger safety seat

Unrestrained child - safety seat violation

Unsafe speed (too fast for conditions)

Unsafe start from parked, stopped or standing position

Vehicle hauling explosives (or flammable materials) failed to stop at RR crossing

Vehicle hailing explosives failed to reduce speed at RR crossing

Violate DL restriction on occupational license

Violate DL restrictions

Warning devices not displayed (flags, fuses, flares, reflectors)

Wrong side of road-not passing

Wrong side, 4 or more lane, two-way roadway

TABLE IV
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **ten (10) penalty points** for each conviction if the date of the violation is within ten (10) years of the date of the driving record evaluation.

Aggravated assault with motor vehicle

Alcohol beverage code offense

Boating while intoxicated

Controlled substance act offense

Criminal negligent homicide-1st or 2nd degree

Dangerous drug act offense

Driving under influence of drugs

Driving under influence (DUI)-minor

Driving while intoxicated

Driving while intoxicated – w/child under 15

Driving while intoxicated-probated

Driving while intoxicated bond forfeiture

Driving while license invalid

Driving while license invalid bond forfeiture

Driving while license disqualified-CMV

Drug offense

Drug offense-bond forfeiture

Fail to stop and render aid-felony

Fail to stop and render aid-misdemeanor

Felony-use of CMV

Felony-use of CMV-controlled substance

Intoxication assault

Intoxication manslaughter

Involuntary manslaughter

Volatile chemical act offense

TABLE V
SCHOOL BUS DRIVER'S DRIVING RECORD EVALUATION

Assess **ten (10) penalty points** for each conviction if the date of the violation is within ten (10) years of the date of the driving record evaluation.

ALR CMV disqualification - .04 or more

ALR CMV disqualification - .04 or more HAZMAT

ALR CMV disqualification - refusal

ALR CMV disqualification - refusal - HAZMAT

ALR suspension - failure

ALR suspension - refusal

ALR suspension – Under 21 – Refusal

ALR suspension – Under 21 - Failure

Figure: 37 TAC §14.34(c)

INSTRUCTOR'S CERTIFICATE FOR SCHOOL BUS DRIVER SAFETY TRAINING IN TEXAS

This is to certify that

_____

has satisfactorily completed all program requirements as specified by the Texas Department of Public Safety and is hereby approved to provide driver training course instruction in school bus safety education in the State of Texas

_____ _____

Training Agency Official's Signature **Name of Training Agency**

_____ _____

Date of Issuance **Instructor's Driver's License Number**

Figure: 37 TAC §14.35(a)

TEXAS SCHOOL BUS DRIVER SAFETY TRAINING CERTIFICATE EXAMPLE

TEXAS SCHOOL BUS DRIVER
SAFETY TRAINING CERTIFICATE

This is to certify that the
driver identified hereinafter has satisfactorily
completed a driver training course in
school bus safety education approved by
the Texas Department of Public Safety.

_____
Director, Department of Public Safety

(front)

Training Agency: RESC ____ * Training Date:
_____
Certification Expiration Date:
_____
Instructor:
_____
(print name)_
RESC Training:
_____
Coordinator (signature)

Driver Name
_____
D. L.#: TX _____ * County/Dist.:
_____

Driver's Signature
_____

(back)

Figure: 37 TAC §14.36(a)(6)

APPENDIX D

Texas Department of Public Safety

Application for School Bus Driver Enrollment Certificate

Authority for Data Collection: Vernon's Texas Civil Statutes, Article 6687b, § 5(a); recodified as Texas Transportation Code Annotated § 521.022 (Vernon 1996) and Title 37, Texas Administrative Code, Section 14.35.
Planned Use of Data: Request by employer for approval of temporary and provisional safety training certificate status to operate a school bus on an emergency basis which will expire based on program guide criteria.
Instructions: Please read carefully all information given below before completing this form. For assistance, please contact the School Transportation Unit at (512) 424-7396 or (512) 424-7395. Mail or fax the completed form to your Regional Education Service Center.

Applicants **must** satisfy **each** of the following prerequisites before their employer may request approval for the issuance of an enrollment certificate from the designated training agency. **Mark the box by each requirement the applicant has met:**

☐ At least 18 years of age;

☐ Possess a valid driver's license designating a class appropriate (with applicable endorsement, if commercial driver's license) for the gross vehicle weight rating and manufacturer's designed passenger capacity of motor vehicle to be operated;

☐ An acceptable "driving history record" (secured from the Texas Department of Public Safety) determined in accordance with the provisions of the most current Texas Department of Public Safety publication entitled *School Bus Driver's Driving Record Evaluation;*

☐ An acceptable "criminal history record" (secured from any state law enforcement agency) reviewed in accordance with the current provisions of Texas Education Code Annotated, Section 22.084;

☐ An acceptable physical examination conducted by a licensed physician and evaluated in accordance with all qualifications and standards specified on the most current Texas Department of Public Safety form titled *Medical Examination Report for School Bus Drivers*, and pre-employment/pre-duty drug testing (evaluated in accordance with current federal law); and

☐ A school district or contractor must ensure drivers have an acceptable level of knowledge and skill regarding the safe operation of school buses. It is the employer's inherent responsibility to ensure that the driver understands the contents of Units II, IV, V, VIII and X of the current *Course Guide for School Bus Driver Training in Texas.*

Except as approved by the designated training agency, the following eligibility requirements **shall** apply to the issuance of **all** enrollment certificates:

- All recipients shall be registered for the first available basic (20-hour training) certification course as determined by the training agency; this includes anyone issued an enrollment certificate during the twelve-month interval (grace period for renewal) immediately following certification expiration. Failure to satisfactorily complete the course as scheduled shall result in immediate revocation of the certificate, and it ***cannot*** be reissued.
- It is highly recommended that all enrollment certificates shall be dated to expire *no later than 180 days* passed the date issued. In the event a class is not scheduled within 180 days, the enrollment certificate may be dated to expire within a reasonable period of time following the conclusion of the first available certification course. Except as approved by the Regional Education Service Center, a minimum of five years must elapse between the issuance of consecutive enrollment certificates.

Please *print* or *type* all information requested below and forward the completed application to your designated training agency for processing. Please keep on file a copy of this form and any verification received from the training agency to document approval for enrollment certification.

Applicant's Name: _____
(Last) (First) (Middle)

Date of Birth _____ / _____ / _____ Driver's License Information: _____
(Month) (Day) (Year) (State) (Identification number)

This applicant needs the class taught in: English ☐ Spanish ☐

Employer/District: _____ Telephone: _____
(Name and county / district number, if applicable) (Area code, number, and extension, if applicable)

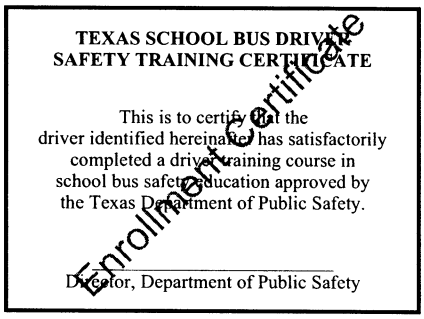
I affirm that this applicant has fulfilled all of the above requirements (which I indicated by an 'X in the box next to each requirement) necessary for the issuance of an enrollment certificate. Pending official notification of approval for an enrollment certificate from the designated agency, it shall be unlawful for the applicant to operate a school bus for the purpose of transporting students.

_____ _____
(Name, title, and signature of authorized employer/district official) (Date Submitted)

Revised 3/2008

Figure: 37 TAC §14.36(b)(4)

TEXAS SCHOOL BUS DRIVER SAFETY TRAINING CERTIFICATE EXAMPLE



(front)

(back)

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Capital Area Rural Transportation System

Invitation for Bids

The Capital Area Rural Transportation System (CARTS) is requesting bids for 22 and 25 foot cutaway buses on behalf of all Rural Transit Districts in Texas participating in this joint procurement.

It is anticipated that 120-150 buses will purchased under this procurement. Texas state law requires that bus purchases be made through a certified Texas dealer.

Bid documents will be available on March 10, 2009. If you are a licensed Texas dealer for this type of bus, or a manufacturer of this type of bus, and you wish to receive an electronic copy of the bid document, send a request to TexasBusBuy@RideCARTS.com. All correspondence and actions related to this bid will be done by electronic mail ONLY.

The schedule for the pre-bid conference and other events for this procurement will be provided with the bid documents. A public bid opening for this procurement is scheduled to be conducted at CARTS, 2010 East 6th Street, Austin, Texas 78702 at 2:00 p.m. CST on April 15, 2009.

TRD-200900880
David Marsh
General Manager
Capital Area Rural Transportation System
Filed: February 26, 2009

♦ ♦ ♦

Comptroller of Public Accounts

Notice of No Contract Award

The Texas Comptroller of Public Accounts (Comptroller) announces this notice of no contract award and the withdrawal of the Request for Proposals, RFP #186b for bank loan investment management services for the Texas Prepaid Higher Education Tuition Board.

The notice of issuance of the RFP was published in the May 30, 2008, issue of the *Texas Register* (33 TexReg 4349).

TRD-200900912
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: March 2, 2009

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 03/09/09 - 03/15/09 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 03/09/09 - 03/15/09 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 03/01/09 - 03/31/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 03/01/09 - 03/31/09 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200900920
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: March 3, 2009

♦ ♦ ♦

Texas Education Agency

Notice of Correction: Request for Applications Concerning Dropout Prevention Mini-Grants

The Texas Education Agency (TEA) published Request for Applications (RFA) #701-09-111 concerning Dropout Prevention Mini-Grants for school year 2008-2009 in the February 6, 2009, issue of the *Texas Register* (34 TexReg 868).

The TEA is amending the deadline for receipt of applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Tuesday, April 14, 2009, to be eligible to be considered for funding. This correction reflects a change from the original deadline date of Thursday, March 26, 2009.

Further Information. For clarifying information about the RFA, contact Kathy Mihalik, Division of Discretionary Grants, TEA, (512) 463-9269.

TRD-200900928
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: March 4, 2009

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that, before the commis-

sion may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 13, 2009**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 13, 2009**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: AMBICA CORPORATION dba Pecan Food Mart; DOCKET NUMBER: 2009-0019-PST-E; IDENTIFIER: RN101382018; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(2) COMPANY: Aqua Water Supply Corporation; DOCKET NUMBER: 2008-1790-MWD-E; IDENTIFIER: RN102076890; LOCATION: Elgin, Bastrop County; TYPE OF FACILITY: iron removal plant and associated water treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number 14225001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits for total suspended solids (TSS) and flow; PENALTY: $5,800; Supplemental Environmental Project (SEP) offset amount of $4,640 applied to Lower Colorado River Authority's Household Hazardous Waste and Reusable Materials Collection; ENFORCEMENT COORDINATOR: Jeremy Escobar, (512) 239-1460; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(3) COMPANY: ASHNOOR, L.L.C. dba Kempwood 66; DOCKET NUMBER: 2008-1681-PST-E; IDENTIFIER: RN101761609; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with resale of gasoline; RULE VIOLATED: 30 TAC §115.244(1) and (3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system (VRS); 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II VRS and each current employee receives in-house Stage II vapor recovery training; 30 TAC §115.246(1) and (3) and THSC, §382.085(b), by failing to maintain all required Stage II records at the station and make them immediately available for review; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery (ORVR) compatible systems; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $8,419; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: Belco Manufacturing Company, Inc.; DOCKET NUMBER: 2008-1952-AIR-E; IDENTIFIER: RN100215524; LOCATION: Belton, Bell County; TYPE OF FACILITY: fiberglass tank manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), Federal Operating Permit Number O-02192, General Terms and Conditions, and THSC, §382.085(b), by failing to submit the annual compliance certification; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: Brumley Manufacturing, LLC; DOCKET NUMBER: 2009-0006-AIR-E; IDENTIFIER: RN105555767; LOCATION: Hempstead, Waller County; TYPE OF FACILITY: welding fabrication plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization for air emissions; PENALTY: $2,100; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: C & R Distributing, Inc.; DOCKET NUMBER: 2008-1417-AIR-E; IDENTIFIER: RN102492139; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: unmanned gasoline dispensing site; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the maximum Reid vapor pressure requirement of seven pounds per square inch absolute; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(7) COMPANY: City of Cedar Park; DOCKET NUMBER: 2008-1552-MWD-E; IDENTIFIER: RN102845914; LOCATION: Cedar Park, Williamson County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: the Code, §26.121(d), by failing to prevent a discharge of a pollutant into the waters of the state; PENALTY: $10,000; SEP offset amount of $10,000 applied to holding a collection event to collect, properly dispose, or recycle household non-hazardous materials; ENFORCEMENT COORDINATOR: Danielle Porras, (512) 239-2602; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(8) COMPANY: Cherokee Independent School District; DOCKET NUMBER: 2008-1731-PWS-E; IDENTIFIER: RN101279057; LOCATION: Cherokee, San Saba County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(3)(A)(ii), by failing to collect a set of repeat coliform samples with 24 hours of being notified of a total coliform positive result; 30 TAC §290.109(f)(3) and THSC, §341.031(a), by exceeding the maximum contaminant level for total coliform; and 30 TAC §290.109(c)(2)(F), by failing to collect at least five routine distribution samples following a total coliform positive sample result; PENALTY: $3,008; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(9) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2008-1771-AIR-E; IDENTIFIER: RN102320850; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c), Air Permit Number 7719A, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $6,400; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(10) COMPANY: Circleville Store & Grain, Inc.; DOCKET NUMBER: 2008-1610-AIR-E; IDENTIFIER: RN104396551; LOCATION: Taylor, Williamson County; TYPE OF FACILITY: grain elevator; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain proper permit authorization prior to the start of operations of a grain elevator; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(11) COMPANY: Comcast of Houston, LLC; DOCKET NUMBER: 2008-1766-PWS-E; IDENTIFIER: RN104415823 and RN104415815; LOCATION: Houston, Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure to sample at the Comcast Keith Harrow and Comcast Old Galveston Road facilities; PENALTY: $4,252; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: Concan Country Club, Inc.; DOCKET NUMBER: 2008-1752-MLM-E; IDENTIFIER: RN105628572; LOCATION: Concan, Uvalde County; TYPE OF FACILITY: golf course, country club, and residential development; RULE VIOLATED: 30 TAC §213.23(a)(1), by failing to obtain approval of an Edwards Aquifer Contributing Zone Plan prior to beginning construction of a regulated activity; and 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $14,000; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(13) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2008-1636-AIR-E; IDENTIFIER: RN102495884; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a) and (c)(7), New Source Review (NSR) Flexible Air Permit Number 9868A/PSD-TX-102M6, SC Number 1, and THSC, §382.085(b), by failing to comply with permitted emissions limits for nitrogen oxides; PENALTY: $10,100; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(14) COMPANY: Bennie Dennis; DOCKET NUMBER: 2008-1808-WOC-E; IDENTIFIER: RN105618458; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §30.5(a) and §30.331(b) and the Code, §26.0301(c) and §37.003, by failing to obtain a wastewater treatment operator Class "D" license; PENALTY: $1,992; ENFORCEMENT COORDINATOR: Carlie Konkol, (361) 825-3100; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: City of Fredericksburg; DOCKET NUMBER: 2008-1563-MSW-E; IDENTIFIER: RN102211844; LOCATION: Fredericksburg, Gillespie County; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §37.131 and §37.271(5), by failing to provide an acceptable financial assurance annual inflation update; PENALTY: $970; ENFORCEMENT COORDINATOR: Michael Graham, (806) 796-7092; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(16) COMPANY: City of Hawk Cove; DOCKET NUMBER: 2008-1821-MWD-E; IDENTIFIER: RN104265848; LOCATION: Hunt County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014522001, Effluent Limitations and Monitoring Requirements Numbers 1 and 3, and the Code, §26.121(a), by failing to comply with permitted effluent limits for TSS, pH, ammonia-nitrogen, and five-day carbonaceous biochemical oxygen demand; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: Francisca Richter dba Hillside Water Works; DOCKET NUMBER: 2008-1559-PWS-E; IDENTIFIER: RN101228492; LOCATION: near Vinton, El Paso County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the consumer confidence report (CCR) to each bill paying customer and by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the water system and that the information in the CCR is correct and consistent with compliance monitoring data; PENALTY: $383; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(18) COMPANY: Houston County Ready-Mix Concrete Company Inc.; DOCKET NUMBER: 2008-1920-AIR-E; IDENTIFIER: RN105606586; LOCATION: Crockett, Houston County; TYPE OF FACILITY: concrete manufacturing plant; RULE VIOLATED: 30 TAC §116.110(a)(2)(A) and §116.611(b) and THSC, §382.0518(a) and §382.085(b), by failing to obtain a permit prior to beginning construction of a concrete batch plant; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(19) COMPANY: I.C.A. Properties, Inc. dba Airline Mobile Home Park; DOCKET NUMBER: 2008-1728-MLM-E; IDENTIFIER: RN101224889; LOCATION: Midland, Midland County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §111.201 and §330.15(c) and THSC, §382.085(b), by failing to comply with the general prohibition on outdoor burning and by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $1,705; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(20) COMPANY: Thomas Rifai dba J & J Truck Stop; DOCKET NUMBER: 2008-1678-PST-E; IDENTIFIER: RN104314869; LOCATION: Ponder, Denton County; TYPE OF FACILITY: convenience store and truck stop with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; and 30 TAC

§334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to provide release detection by failing to conduct reconciliation of detailed inventory control records; PENALTY: $9,518; ENFORCEMENT COORDINATOR: Michael Pace, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: Lone Star Petroleum, LP dba Cook Shell; DOCKET NUMBER: 2008-1782-PST-E; IDENTIFIER: RN102795010; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $6,096; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 425-6010; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(22) COMPANY: Francisco Cornejo dba Marble Palace Company; DOCKET NUMBER: 2008-1192-WQ-E; IDENTIFIER: RN105360010; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $2,100; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: NuStar Terminals Partners TX L.P.; DOCKET NUMBER: 2008-1799-AIR-E; IDENTIFIER: RN100218767; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: bulk storage; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 1677, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(f) and THSC, §382.085(b), by failing to provide additional information regarding the emissions event that occurred on May 9, 2008; PENALTY: $4,394; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(24) COMPANY: Pecan Grove Homes, LP; DOCKET NUMBER: 2008-1676-WQ-E; IDENTIFIER: RN104620216; LOCATION: Schertz, Guadalupe County; TYPE OF FACILITY: wastewater collection system; RULE VIOLATED: the Code, §26.121(a), by failing to prevent the unauthorized discharge of raw sewage; and 30 TAC §30.350(n), by failing to have a licensed operator supervise the wastewater collection system operation and maintenance activities; PENALTY: $6,050; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(25) COMPANY: Poly Trucking, Inc. dba Poly-Trucking; DOCKET NUMBER: 2008-1720-PST-E; IDENTIFIER: RN101542710; LOCATION: Grand Prairie, Dallas County; TYPE OF FACILITY: truck fleet refueling; RULE VIOLATED: 30 TAC §115.246(1) and (4) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them available for review; 30 TAC §115.244(3) and THSC, §382.085(b), by failing to conduct monthly inspections of the Stage II VRS; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to ORVR compatible systems; 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for inspection; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to conduct inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition; 30 TAC §334.45(c)(3)(A), by failing to ensure that the emergency shutoff valves were securely anchored at the base of the dispensers; and 30 TAC §334.48(a) and the Code, §26.121(a)(1), by failing to ensure the station's UST system was operated, maintained, and managed in accordance with industry practices; PENALTY: $34,919; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: QUICK TRACK INCORPORATED dba Quick Track; DOCKET NUMBER: 2008-1744-PST-E; IDENTIFIER: RN103028874; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II VRS; PENALTY: $2,631; ENFORCEMENT COORDINATOR: Michael Pace, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: REHMANIA CLEANERS, L.L.C. dba Premier Cleaners; DOCKET NUMBER: 2008-1367-DCL-E; IDENTIFIER: RN100560523; LOCATION: Houston, Harris County; TYPE OF FACILITY: dry cleaning; RULE VIOLATED: 30 TAC §337.11 and THSC, §374.102, by failing to renew the dry cleaning facility registration by completing and submitting the required registration form; PENALTY: $2,164; ENFORCEMENT COORDINATOR: Michael Graham, (806) 796-7092; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(28) COMPANY: Amirali Ladhani and Fatima Ladhani dba Rick's Drive In; DOCKET NUMBER: 2008-1916-PST-E; IDENTIFIER: RN101907780; LOCATION: Leming, Atascosa County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the UST for releases; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; 30 TAC §334.45(c)(3)(A), by failing to ensure that the emergency shutoff valves were securely anchored at the base of the dispensers; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the UST; PENALTY: $9,760; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(29) COMPANY: S.A.A.A. ENTERPRISES, INC. dba West Airport Food Mart; DOCKET NUMBER: 2008-1656-PST-E; IDENTIFIER: RN102262854; LOCATION: Houston, Harris County; TYPE OF

FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II VRS and each current employee receives in-house Stage II vapor recovery training regarding the purpose and correct operation of the Stage II equipment; 30 TAC §115.246(1) and THSC, §382.085(b), by failing to maintain all required Stage II records at the station and make them immediately available for review; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to ORVR systems; and 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition and free of detects; PENALTY: $3,150; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(30) COMPANY: Shell Oil Company and Shell Chemical LP; DOCKET NUMBER: 2008-1092-AIR-E; IDENTIFIER: RN100211879; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: petroleum refinery and chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), 116.715(a) and (c)(7), Flexible Permit Number 21262/PSD-TX-928, SC Number 1, NSR Permit Number 3219/PSD-TX-974, SC Number 6, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $71,900; SEP offset amount of $35,950 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(31) COMPANY: SUNESARA INVESTMENT INC. dba Baytown Market 2; DOCKET NUMBER: 2008-1944-PST-E; IDENTIFIER: RN101787802; LOCATION: Baytown, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(5) and (6) and THSC, §382.085(b), by failing to maintain Stage II records at the station; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to ORVR compatible systems; 30 TAC §115.242(3)(J) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $6,146; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(32) COMPANY: City of Thornton; DOCKET NUMBER: 2008-1740-PWS-E; IDENTIFIER: RN101239580; LOCATION: Thornton, Limestone County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(e)(4)(B) and THSC, §341.033(a), by failing to operate the water system under the direct supervision of a water works operator who holds a Class "C" or higher license; PENALTY: $282; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(33) COMPANY: Trinity Materials, Inc.; DOCKET NUMBER: 2008-1803-WQ-E; IDENTIFIER: RN101923027; LOCATION: Bronte, Coke County; TYPE OF FACILITY: sand and gravel mining operation; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26, by failing to obtain authorization to discharge storm water associated with an industrial activity; PENALTY: $770; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(34) COMPANY: TXI OPERATIONS, LP; DOCKET NUMBER: 2008-1751-IWD-E; IDENTIFIER: RN102740073; LOCATION: Frisco, Denton County; TYPE OF FACILITY: ready-mixed concrete plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES General Permit Number TXG110167, Permit Requirements Part III, Section A, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for TSS and pH; PENALTY: $14,400; SEP offset amount of $5,760 applied to Keep Texas Beautiful; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(35) COMPANY: Tyson Fresh Meats, Inc.; DOCKET NUMBER: 2008-1836-IWD-E; IDENTIFIER: RN100212943; LOCATION: Potter County; TYPE OF FACILITY: beef packing plant with wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0001873000, Conditions of the Permit, Application Rates, and the Code, §26.121(a), by failing to apply treated wastewater to the irrigation field at or below the permitted application rate; and 30 TAC §305.125(1), TPDES Permit Number WQ0001873000, Conditions of the Permit, Quality, and the Code, §26.121(a), by failing to meet the permitted effluent limits for pH; PENALTY: $3,040; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

TRD-200900914
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: March 3, 2009

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapters 21 and 290

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed amendments to 30 TAC Chapter 21, Water Quality Fees, and Chapter 290, Public Drinking Water, under the requirements of Texas Health and Safety Code, §382.017; and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would increase the Public Health Services Fee, the Consolidated Water Quality Fee, and the Water Use Assessment Fee to ensure that there are sufficient funds to carry out the tasks required to protect water resources in the state.

A public hearing on this proposal will be held in Austin on April 7, 2009, at 10:00 a.m. at the Texas Commission on Environmental Quality complex at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments. Registration begins 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established to assure enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available for discussion 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Patricia Durón at (512) 239-6087. Requests should be made as far in advance as possible.

Comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at

http://www5.tceq.state.tx.us/rules/ecomments. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2009-007-021-PR. The comment period closes April 13, 2009. To view rules, please visit *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information or questions concerning this proposal, please contact Kathleen Ramirez, Water Supply Division, at (512) 239-6757.

TRD-200900901
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 27, 2009

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Notice of Water Quality Applications

The following notices were issued during the period of February 23, 2009 through February 27, 2009.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

HINES NURSERIES INC. which operates Hines Nurseries, a wholesale container plant nursery, has applied for a renewal of Permit No. WQ0003015000 with changes to remove authorization to treat and discharge domestic wastewater. The existing permit authorizes the discharge of storm water runoff, irrigation water runoff, and treated domestic wastewater at a daily maximum flow not to exceed 1,000,000 gallons per day via Outfall 001. The facility is located at 11017 on Farm-to-Market Road 359 approximately one half mile south of Farm-to-Market Road 1093 north of the City of Rosenburg, Fort Bend County, Texas.

CITY OF BRYSON has applied for a renewal of Permit No. WQ0010135001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day via surface irrigation of 43.5 acres of agricultural non-public access land seeded with bermuda grass and wheat crops. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal sites are: The Imhoff tank and sludge drying beds are located on the east side of a gravel road known as Lovers Lane, 0.5 mile south of the intersection with U.S. Highway 380 in Jack County, Texas; the stabilization ponds and irrigation site are located approximately 0.5 mile south-southeast of the intersection of U.S. Highway 380 and Farm-to-Market Road 1191 in Jack County, Texas.

CITY OF WILSON has applied for a renewal of Permit No. WQ0010624001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 58,000 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 0.8 mile southwest of the intersection of Farm-to-Market Roads 400 and 211 and approximately 600 feet west of Farm-to-Market Road 400 in Lynn County, Texas.

CITY OF CEDAR PARK has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0012308001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 5,000,000 gallons per day. The facility is located one mile southeast of the intersection of U.S. Highway 183 and Brushy Creek Road in the City of Cedar Park in Williamson County, Texas.

AQUA UTILITIES INC. has applied for a renewal of TPDES Permit No. WQ0013022001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 88,000 gallons per day. The facility is located at 4704 Blue Water Circle, on the north shore of Lake Granbury, approximately 2 miles from the Lake Granbury Dam and south of Hood County Road No. 309 in Hood County, Texas.

MILLSAP INDEPENDENT SCHOOL DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of Permit No. WQ0013537001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 16,000 gallons per day via surface irrigation of 13 acres of limited access athletic fields. The permittee will maintain bermuda grass on the disposal site. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 1,700 feet northeast of the intersection of Farm-to-Market Road 3028 and Farm-to-Market Road 113 in Parker County, Texas.

NEW ULM WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0013655001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located on Bernard Road, one mile southeast of the intersection of Farm-to-Market Road 109 and Farm-to-Market Road 1094 in Austin County, Texas

AUS-TEX PARTS AND SERVICES LTD has applied for a renewal of TPDES Permit No. WQ0014104001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 99,000 gallons per day. The facility will be located approximately 1,500 feet west-northwest of the intersection of State Highway 21 and Old Lockhart Road in Caldwell County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200900930
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 4, 2009

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Proposal for Decision

The State Office of Administrative Hearings (SOAH) issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality (TCEQ) on February 27, 2009, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. City of Thornton; SOAH Docket No. 582-08-1895; TCEQ Docket No. 2006-0571-MWD-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against City of Thornton on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you

have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200900931
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 4, 2009

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Texas Facilities Commission

Request for Proposals #303-9-10711-A

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission, announces the issuance of Request for Proposals (RFP) #303-9-10711-A. TFC seeks a five year lease of approximately 7,000 square feet of warehouse space in Beaumont, Texas.

The deadline for questions is March 20, 2009, and the deadline for proposals is March 27, 2009, at 3:00 p.m. The award date is April 18, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=81328.*

TRD-200900934
Kay Molina
General Counsel
Texas Facilities Commission
Filed: March 4, 2009

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Grayson County Regional Mobility Authority

Request for Qualifications

The Grayson County Regional Mobility Authority ("GCRMA"), a political subdivision of the State of Texas, is seeking qualifications from professional financial advisory firms interested in providing financial advisory services to the GCRMA.

A request for qualifications ("RFQ") packet may be obtained electronically from the website of the GCRMA at http://www.co.grayson.tx.us/gcrma.htm. Copies will also be available by contacting the GCRMA at (903) 786-3566. Periodic updates, addenda, and clarifications may be posted on the GCRMA website, and interested parties are responsible for monitoring the website accordingly. Final proposals must be received by the Grayson County Regional Mobility Authority, 4700 Airport Drive, Denison, Texas 75020 by 4:00 p.m., C.S.T., March 30, 2009, to be eligible for consideration.

Each firm will be evaluated based on the criteria and process set forth in the RFQ. The final selection of the GCRMA financial advisor(s) will be made by the GCRMA Board of Directors.

TRD-200900924
Mike Shahan
Director
Grayson County Regional Mobility Authority
Filed: March 3, 2009

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Department of State Health Services

Notice of Request for Proposal for Zoonosis Control Branch's Animal Friendly Grants for the Spay/Neuter Project

INTRODUCTION

The Department of State Health Services (DSHS), Zoonosis Control Branch, announces a Request for Proposal (RFP) for the sterilization of dogs and cats owned by the general public at minimal or no cost. The RFP was released on February 27, 2009.

PURPOSE

The availability of fiscal year 2010 state funds from the sale of Animal Friendly license plates is expected to provide grants for the sterilization of dogs and cats owned by the public at no or minimal cost.

PERIOD OF PROJECT

The contract will begin on September 1, 2009, and will be made for a 12-month budget period with a project period of 2 years.

AVAILABLE FUNDS

Approximately $225,000 is expected to be available to fund multiple contracts. One grant award per project period will be awarded per agency for the sterilization of dogs and/or cats in a minimum amount of $5,000 to a maximum amount of $20,000 per year. The specific dollar amount awarded to each applicant depends upon the merit and scope of the proposed project.

ELIGIBLE APPLICANTS

Eligible applicants include: a private or public animal shelter (releasing agency); an organization that is qualified as a charitable organization under Internal Revenue Code, §501(c)(3), that has animal welfare or sterilizing dogs and cats owned by the general public at minimal or no cost as its primary purpose; or a local nonprofit veterinary medical association - an organization set up by and comprised of several volunteer veterinarians in their immediate region for the purpose of presenting continuing education, planning group activities, or discussing issues common to their professional field, and has an established program for sterilizing dogs and cats owned by the general public at minimal or no cost. If an applicant is currently debarred, suspended, or otherwise excluded or ineligible for participation in federal or state assistance programs, the applicant is ineligible to apply for funds under this RFP.

SCHEDULE OF EVENTS

Issuance of the RFP: February 27, 2009

Application Deadline: May 1, 2009, 2:00 p.m. Central Standard Time

Award Notification: June 20, 2009

Contract Start Date: September 1, 2009

TO OBTAIN A COPY OF THE RFP

It is preferred that requests to obtain a copy of the RFP be downloaded from the Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us. Those organizations without Internet access may obtain a copy of the RFP by contacting Anna James, Client Services Contracting Unit MC 1886, P.O. Box 149347, Room T-502, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3199, Fax: (512) 458-7351, email: annam.james@dshs.state.tx.us

CONTACT PERSON

All communications concerning the RFP shall be addressed in writing, by mail, by fax, or by email to Anna James, Client Services Contracting

Unit MC 1886, Room T-502, Department of State Health Services, P.O. Box 149347, 1100 West 49th Street, Austin, Texas 78756-3199, Fax: (512) 458-7351, email: annam.james@dshs.state.tx.us.

TRD-200900898
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: February 27, 2009

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Houston-Galveston Area Council

Request for Quotes

The Houston-Galveston Area Council (H-GAC) is issuing a Request for Quotes (RFQ) for a Portable Kiosk Job Matching System. This System must be capable of matching job seekers' skills/experience with employer job orders within a customized database. Bids would be based on a per Kiosk basis with an estimated 14 in the 13 county Gulf Coast region. Quotes may be submitted to H-GAC, Human Services-Workforce, P.O. Box 22777, Houston, Texas 77227-2777, by calling Carol Kimmick at (713) 627-3200 or email carol.kimmick@hgac.com. Quotes are due at the H-GAC offices, 3555 Timmons Lane, Suite 120, Houston, Texas 77027 no later than 12:00 p.m. (noon) Central Standard Time on Monday, March 16, 2009. Late quotes will not be accepted. There will be no exceptions.

TRD-200900921
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: March 3, 2009

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by AMERICAN INTERNATIONAL PACIFIC INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Denver, Colorado.

Application for admission to the State of Texas by AMERICAN INTERNATIONAL INSURANCE COMPANY OF DELAWARE, a foreign fire and casualty company. The home office is in Wilmington, Delaware.

Application to change the name of MAIDEN REINSURANCE COMPANY to GMAC DIRECT INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Maryland Heights, Missouri.

Application for incorporation in the State of Texas by GLOBAL GUARDIAN INSURANCE COMPANY, a domestic fire and casualty company. The home office is in El Paso, Texas.

Application to change the name of MBIA INSURANCE CORP. OF ILLINOIS, a foreign fire and casualty company. The home office is in Springfield, Illinois.

Application for incorporation in the State of Texas by THE WOODLANDS INSURANCE COMPANY, a domestic fire and casualty company. The home office is in The Woodlands, Texas.

Application to do business in the State of Texas by UNIVERSAL HMO OF TEXAS, INC., a domestic Health Maintenance Organization. The home office is in Dallas, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200900933
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: March 4, 2009

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Third Party Administrator Applications

The following third party administrator applications have been filed with the Texas Department of Insurance and are under consideration.

Application of HPHG, LLC (using the assumed name of CAPROCK HEALTHPLANS), a domestic third party administrator. The home office is LUBBOCK, TEXAS.

Application of NORTH AMERICAN RISK SERVICES, INC., a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Any objections must be filed within 20 days after this notice is published in the *Texas Register,* addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200900929
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: March 4, 2009

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Texas Lottery Commission

Instant Game Number 1187 "Snow Dough"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1187 is "SNOW DOUGH". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1187 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1187.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, BELL SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 and $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1187 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
BELL SYMBOL	BELL
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
$20,000	20 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1187), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1187-0000001-001.

K. Pack - A pack of "SNOW DOUGH" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SNOW DOUGH" Instant Game No. 1187 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SNOW DOUGH" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to either WINNING NUMBER play symbol, the player wins PRIZE shown for that number. If a player reveals a "BELL" play symbol, the player wins the PRIZE shown for that symbol instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "BELL" (auto win) play symbol will never appear more than once on a ticket.

C. No more than two (2) matching non-winning prize symbols on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "SNOW DOUGH" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SNOW DOUGH" Instant Game prize of $1,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SNOW DOUGH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SNOW DOUGH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SNOW DOUGH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1187. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1187 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	707,520	11.36
$4	771,840	10.42
$5	321,600	25.00
$10	176,880	45.45
$20	48,240	166.67
$50	14,874	540.54
$100	6,700	1,200.00
$1,000	34	236,470.59
$20,000	8	1,005,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.93. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1187 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1187, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200900883
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 27, 2009

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Texas Parks and Wildlife Department

Pre-Solicitation Notice

Design and Master Planning Services for Galveston Island Redevelopment, Galveston Island State Park

This Pre-Solicitation Notice is for information purposes only. This is not a request for submission of proposals or qualifications. Responses or other inquiries are not appropriate at this time.

The Infrastructure Division of the Texas Parks and Wildlife Department (TPWD) intends to issue a Request for Qualifications (RFQ) for Professional Design and Master Planning Services for Redevelopment, Galveston Island State Park, Galveston County, Texas on March 19, 2009.

Detailed information about the requirements and selection process will be provided in the RFQ. The purpose of this Pre-Solicitation Notice is to inform qualified entities interested in providing these services that the release of the RFQ is imminent.

Upon issuance of the RFQ on March 19, 2009, all solicitation information will be available electronically on TPWD's website: http://www.tpwd.state.tx.us/business/bidops/current_bid_opportunities/construction/ and on the Electronic State Business Daily website at http://esbd.cpa.state.tx.us.

Hard copy documents relating to the March solicitation for Professional Design and Master Planning Services will also available at no charge by calling (512) 389-4442 or by e-mailing a request to contracting@tpwd.state.tx.us.

Galveston Island State Park was destroyed by Hurricane Ike in September 2008. In an effort to restore the park for public use, TPWD has requested funds from the current legislative session. The redevelopment of Galveston Island State Park will consist of developing a Master Plan which will direct the overall programming and location of all park facilities. The plan shall recommend a multi-phased construction approach. The initial phase of construction will allow park visitors daily recreational use of appropriate amenities within the Park infrastructure. The completed construction project will restore Galveston Island SP to a fully functional park with overnight camping capabilities.

The goal of the solicitation is to award a Professional Design Services contract to the most qualified firm to provide design and master planning services for the subject project in accordance with Government Code Chapter 2254.

TRD-200900896
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: February 27, 2009

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on February 23, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cable One, Inc. for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36731 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the City of Aransas Pass, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36731.

TRD-200900879
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 26, 2009

♦ ♦ ♦

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on February 25, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Telecom Cable, LLC for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36738 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the municipalities of Bruni, Encincal, Oilton, and Stockdale, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36738.

TRD-200900917
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: March 3, 2009

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 23, 2009, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of 1 Starview Solutions, L.P. d/b/a Starview Solutions for a Service Provider Certificate of Operating Authority, Docket Number 36729 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, Optical Services, T1-Private Line, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 18, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36729.

TRD-200900881
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 26, 2009

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on February 26, 2009, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of one thousand-block of numbers in the Grapevine rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 36744.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 18, 2009. Hearing and speech impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36744.

TRD-200900918
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: March 3, 2009

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San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposals - Legal Services

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking qualifications/proposals for Legal Services.

A copy of the Request for Qualifications/Proposals (RFQ/P) may be requested by downloading the RFQ/P from the MPO's website at www.sametroplan.org or calling Jeanne Geiger, Deputy Director, at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Friday, April 10, 2009, at the MPO office to:

Isidro "Sid" Martinez

Director

San Antonio-Bexar County Metropolitan Planning Organization

825 South Saint Mary's

San Antonio, Texas 78205

The MPO's Executive Committee will review the qualifications/proposals and the contract award will be made by the MPO's Transportation Policy Board.

Funding is contingent upon the availability of Federal transportation planning funds.

TRD-200900932
Jeanne Geiger
Deputy Director
San Antonio-Bexar County Metropolitan Planning Organization
Filed: March 4, 2009

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Supreme Court of Texas

Order Adopting Amendments to Texas Rule of Disciplinary Procedure 6.06 and Board of Disciplinary Appeals Internal Procedural Rules

Misc. Docket No. 09-9034

ORDERED that:

1. Texas Rule of Disciplinary Procedure 6.06 and the Internal Procedural Rules of the Board of Disciplinary Appeals (BODA) are amended as follows.

2. These changes, with any modifications made after public comments are received, take effect July 1, 2009. Comments may be submitted to the Court in writing on or before June 1, 2009. Comments should be directed to Kennon L. Peterson, Rules Attorney, at P.O. Box 12248, Austin. Texas, 78711, or kennon.peterson@courts.state.tx.us.

3. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each elected member of the Legislature; and

d. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

In Chambers, this 24th day of February, 2009.

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Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Harriet O'Neill, Justice

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J. Dale Wainwright, Justice

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Scott Brister, Justice

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David M. Medina, Justice

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Paul W. Green, Justice

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Phil Johnson, Justice

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Don R. Willett, Justice

TEXAS RULES OF DISCIPLINARY PROCEDURE

6.06. ~~Publication of~~ Court and Board of Disciplinary Appeals Opinions

~~All cases involving the Professional Misconduct or Disability of an attorney appealed to the Courts of Appeals or to the Supreme Court of Texas must be published in the official reporter system. This provision takes precedence over the applicable Texas Rules of Appellate Procedure.~~

A. Court Opinions: Notwithstanding the Texas Rules of Appellate Procedure, in any case arising out of a Complaint, an opinion of a court of appeals has precedential value regardless of its designation.

B. Board of Disciplinary Appeals Opinions: Board of Disciplinary Appeals opinions are open to the public and must be made available to public reporting services, print or electronic, for publishing. These opinions are persuasive, not precedential, in disciplinary proceedings tried in district court.

Comment to 2009 change: Rule 6.06 is divided into two subdivisions. Subdivision A is amended to remove an outdated reference to the official reporter system. Subdivision A is also amended to be consistent with amendments to Texas Rule of Appellate Procedure 47, intended to prospectively discontinue designating opinions as either "published" or "unpublished." But unlike the erroneously designated opinions addressed in Texas Rule of Appellate Procedure 47.7(b), the erroneously designated opinions addressed in this rule have precedential value from 1992 on. Subdivision B addresses Board of Disciplinary Appeals (BODA) opinions and includes a distribution provision similar to Texas Rule of Appellate Procedure 47.3. This change provides for the publication of BODA opinions issued in any type of case, whether pursuant to BODA's original or appellate jurisdiction.

BODA INTERNAL PROCEDURAL RULES

Rule 1.16 BODA Opinions

(a) BODA may render judgment with or without written opinion in any disciplinary matter. In accordance with TRDP 6.06, all written opinions of BODA are open to the public and shall be made available to the public reporting services, print or electronic, for publishing. A majority of the members who participate in considering the disciplinary matter must determine if an opinion will be written. The names of the participating members must be noted on all written opinions of BODA.

(b) Only a member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this Rule, in hearings in which evidence is taken, no member may participate in the decision

unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.

(c) A BODA determination in an appeal from a grievance classification decision under TRDP 2.10 is not a judgment for purposes of this Rule and may be issued without a written opinion.

Rule 4.10 Decision and Judgment

(a) **Decision.** BODA may affirm in whole or in part the decision of the evidentiary panel, modify the panel's finding(s) and affirm the finding(s) as modified, reverse in whole or in part the panel's finding(s) and render such decision as the panel should have rendered, or reverse the panel's finding(s) and remand the cause for further proceedings to be conducted by:

(1) the panel that entered the finding(s); or

(2) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.

~~(b) Opinions. BODA may render judgment with or without written opinion.~~

(b~~e~~) **Notice of Orders and Judgment.** When BODA renders judgment or grants or overrules a motion, the clerk shall give notice to the parties or their attorneys of record of the disposition made of the cause or of the motion, as the case may be. The notice shall be given by first-class mail and be marked so as to be returnable to the clerk in case of nondelivery.

(c~~d~~) **Mandate.** In every case where BODA reverses or otherwise modifies the judgment appealed from, BODA shall issue a mandate in accordance with its judgment and deliver it to the evidentiary panel.

TRD-200900923
Kennon Peterson
Rules Attorney
Supreme Court of Texas
Filed: March 3, 2009

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Order Amending Rule of Judicial Administration 12.7

Misc. Docket No. 09-9012

It is hereby ORDERED that:

1. Pursuant to Section 31(a) of Article V of the Texas Constitution and Section 74.024 of the Texas Government Code, Subdivision 12.7(a)(2) of the Texas Rules of Judicial Administration is amended, as follows.

2. By Order dated November 17, 2008, in Misc. Docket No. 08-9165, the Court proposed amendments to Subdivision 12.7(a)(2) of the Texas Rules of Judicial Administration and invited public comment. The Court did not receive any comments and did not may any additional revisions to the rule.

3. The amended version of Subdivision 12.7(a)(2) of the Texas Rules of Judicial Administration takes effect on March 31, 2009.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each elected member of the Legislature before December 1, 2010; and

d. submit a copy of this Order for publication in the *Texas Register.*

SIGNED AND ENTERED, this 10th day of February, 2009.

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Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Harriet O'Neill, Justice

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J. Dale Wainwright, Justice

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Scott Brister, Justice

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David M. Medina, Justice

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Paul W. Green, Justice

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Phil Johnson, Justice

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Don R. Willett, Justice

12.7 Costs for Copies of Judicial Records; Appeal of Assessment.

(a) *Cost.* The cost for a copy of a judicial record is either:

(1) the cost prescribed by statute, or

(2) if no statute prescribes the cost, the ~~actual~~ cost~~,~~ ~~as~~ the Office of the Attorney General prescribes by rule ~~defined~~ in the ~~section 111.62, Title 1,~~ Texas Administrative Code~~, not to exceed 125 percent of the amount prescribed by the General Services Commission for providing public information under Title 1, Texas Administrative Code, Sections 111.63, 111.69, and 111.70~~.

Comment to 2008 change: The Attorney General's rule, adopted in accordance with Section 552.262 of the Government Code, is in Section 70.3 of Title 1 of the Texas Administrative Code.

TRD-200900919
Kennon Peterson
Rules Attorney
Supreme Court of Texas
Filed: March 3, 2009

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Texas Department of Transportation

Pass-through Toll Finance Program Call - 2009

In accordance with Minute Order 111710 approved by the Texas Transportation Commission (commission) on February 26, 2009, and pursuant to Transportation Code, §222.104(b), and Title 43, Texas Administrative Code (43 TAC), Chapter 5, Subchapter E, the Texas Department of Transportation (department) issues this 2009 Program Call for highway projects to be developed on the state highway system under a pass-through toll agreement. Pursuant to 43 TAC §5.54, the commission determined that: (i) monies available that can be allocated among all proposals selected under this program call will be limited to an esti-

mated total of $300 million in Category 12 funds, and (ii) only the following category of project costs described in 43 TAC §5.53(a)(11) will be considered as eligible for reimbursement under this program call: construction cost, exclusive of construction engineering cost, and in the case of a pass-through toll project submitted as a design-build project, the construction cost, exclusive of construction engineering costs must be broken out separately as one component of the total project cost. The cost categories of design, development (including environmental clearance, right-of-way acquisition, utility adjustment), financing, maintenance, and operation are specifically excluded.

The department will accept proposals from both public and private entities that are submitted in accordance with the terms of this notice, Minute Order 111710, and 43 TAC Chapter 5, Subchapter E. The due date for acceptance of proposals is 3:00 p.m., Tuesday, May 12, 2009. The submission must be an electronic copy of the proposal in Adobe PDF format on a labeled compact disk, along with one hard copy, addressed to Phillip Russell, Assistant Executive Director for Innovative Project Development, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701. An additional electronic copy of the proposal, along with one hard copy, should be addressed to the local District Office where the proposed project will be located. The addresses of the district offices are available on the department's internet website, www.txdot.gov.

The department will evaluate the submitted proposals using the items of criteria set forth in 43 TAC §5.55 and present its analyses to the commission. Based on the staff's analysis and the commission's evaluation of the proposals, the commission may select the proposals that provide the best value to the state and direct the department staff to attempt to negotiate the financial terms of a potential pass-through toll agreement with the selected public entity proposers, and will solicit competitive proposals under 43 TAC §5.56 for the selected private entity proposers.

In the event that an alternative funding source or a significant increase in Category 12 funding becomes available for use in the program prior to August 31, 2009, or any extended date, the commission may authorize an additional deadline period for submitting proposals to be in compliance with conditions specific to the new period, in accordance with the requirements of 43 TAC §5.54. Provided further, that in the event a critical transportation need which can be addressed with a pass-through toll agreement arises after May 12, 2009, or an alternative funding source becomes available for a specific transportation project, the commission may, at any time and irrespective of the limitations set forth in this program call, authorize acceptance of an individual proposal for development of a pass-through toll project to meet that need or utilize those funds, provided that the proposal otherwise complies with 43 TAC Chapter 5, Subchapter E.

Information regarding the proposal application guidelines for pass-through toll financing of highway projects will be available electronically on the department's website, www.txdot.gov/business, and at the following address: Texas Department of Transportation, Attn: Mark A. Marek, 118 East Riverside Drive, Building 118, Austin, Texas 78704, (512) 416-2576, on or after March 13, 2009.

TRD-200900913
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: March 3, 2009

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 33 (2008) is cited
as follows: 33 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).